Labor Strife and Peace

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This Article examines a significant yet underexplored feature in the decline of worker power: the gradual erosion of protections under the National Labor Relations Act (NLRA or the Act) for workplace protest by rank-and-file, nonunion workers. Rather than protect that protest as necessary to engender solidarity and organizing, current labor doctrine offers employers various opportunities to fire workplace agitators. Focusing on nonunion workers standing up to management, this Article offers three key insights into U.S. labor law. First, it draws on social movements to confirm strife's vital but uneasy role in workplace solidarity. Second, it unearths the NLRA's original intention to protect the co-constitutive roles of strife and industrial peace. The New Dealers viewed conflict as a short-term step toward achieving collective bargaining's peaceful dispute resolution. Third, it shows how the United States Supreme Court and National Labor Relations Board (NLRB) misconstrue the NLRA's industrial peace objective as both the means and the ends of labor relations, to the detriment of strife and the solidarity it generates. This Article calls for greater doctrinal and statutory protections for nonunion workers engaged in workplace protest while clarifying when protests cross the line.

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INTRODUCTION

Lexi Rizzo worked for Starbucks for nearly eight years when management fired her for trying to garner worker support to form a union.[1] Of course, Starbucks had long learned not to make its intentions to rid the workforce of solidarity

1. *See* Greg Jaffe, *A Barista Fought to Unionize Her Starbucks. Now She's Out of a Job*, WASH. POST (June 17, 2023), https://www.washingtonpost.com/business/interactive/2023/starbucks-union-fired-worker/ [https://perma.cc/CH5Z-HNXM].

obvious. It instead cited Lexi's arrival to work one minute late.[2] Removing Lexi from the shop floor silenced her efforts to fight for better health insurance, wages, and more reliable working hours.[3] Following her dismissal, Lexi had to turn to food stamps, Medicaid, and unemployment benefits.[4] She fought for greater workplace rights but was ultimately discharged without legal redress.[5]

Unfortunately, Lexi is not alone. The number of workers fired or otherwise disciplined by employers before they have the chance to organize has skyrocketed.[6] Successful union organizing is at an all-time low, leaving wages somewhat suppressed and vulnerable to rapid inflation.[7] The decline in collective bargaining has contributed to "growing economic inequality, growing pay gaps for women and workers of color, and declining voice in our democracy for working class Americans."[8] Employers overpower workers to the detriment of economic growth, societal values, and the equitable distribution of wealth.[9]

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2. *Id.*

3. *Id.* (detailing the workplace conditions that Lexi fought to improve while working at Starbucks).

4. *Id.*

5. Starbucks has fired numerous workers since 2020 that sought to organize the workplace. Despite findings by administrative law judges and the National Labor Relations Board (NLRB) that Starbucks' actions were unlawful, the company continues to dispute them, leaving the cases in limbo. *See* Michael Sainato, *'This is Psychological Warfare': Starbucks Workers Allege Anti-Union Firings*, GUARDIAN (Sept. 4, 2023), https://www.theguardian.com/us-news/2023/sep/04/starbucks-labor-union-retaliation-firings [https://perma.cc/5GKU-YRAL] ("A staggering 633 open or settled unfair labor practice charges have been docketed against Starbucks by NLRB regional offices."). In May 2023, an appellate court upheld a district court's finding that Starbucks had unlawfully fired seven employees (the "Memphis Seven") who had been trying to organize the workplace and issued a temporary injunction against the company. *See* McKinney *ex rel.* NLRB v. Starbucks Corp., 77 F.4th 391 (6th Cir. 2023). Rather than accept the legal penalties, Starbucks has appealed to the Supreme Court, which the Supreme Court agreed to hear later in 2024.

6. In 2022, unfair labor practice charges increased by sixteen percent from the same 2021 period. *See Correction: First Three Quarters' Union Election Petitions Up 58%, Exceeding All FY21 Petitions Filed*, NLRB (July 15, 2022), https://www.nlrb.gov/news-outreach/news-story/correction-first-three-quarters-union-election-petitions-up-58-exceeding [https://perma.cc/7GKR-4D5V] (noting that the NLRB is facing more cases than it has "in years" with a sixteen percent increase in 2022).

7. Andy Levin & Colton Puckett, *Labor Law Reform at a Critical Juncture: The Case for the Protecting the Right to Organize Act*, 59 HARV. J. LEGIS. 1, 17 (2022) ("Studies have shown that, concomitant with the decline in union membership, stagnant wages persist despite record productivity and corporate profits."); Alí R. Bustamante, *A New Era for Worker Power: Labor Wins during the Pandemic, and the Policies We Need to Sustain the Momentum*, ROOSEVELT INST. 10 (2022); Ian Kullgren, *Union Membership Rate in US Dips Even Amid Economic Recovery*, BLOOMBERG L. (Jan. 19, 2023), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/daily-labor-report/BNA%2000000185-c659-d1d6-af8d-cfdb261b0001 [https://perma.cc/W5W5-CKPQ] (noting 2022 statistics showing that "[m]edian weekly earnings were about $1,200 for union members, compared to $1,000 for non-union workers, about $50 higher than the previous year for workers in both categories").

8. WHITE HOUSE TASK FORCE ON WORKER ORG. & EMPOWERMENT, REPORT TO THE PRESIDENT 4 (2022).

9. *See, e.g.*, Levin & Puckett, *supra* note 7, at 18 (arguing that organized workers are better equipped to fight "against racial and gender inequality, narrowing the income inequality gap, and providing workers with a collective voice in the political arena to serve as a countervailing power against the influence of large corporations, the wealthy elite, and the interest groups that cater to them").

There has been a dramatic resurgence of workplace strife in America,[10] from auto plants to grocery stores to universities to Hollywood, garnering the Summer of 2023 the "Hot Strike Summer."[11] That resurgence has renewed attention on unions and their ability to fight for greater democracy and power at the workplace. Meanwhile, the fates of rank-and-file, nonunion workers, such as Lexi, who challenge management at the workplace without union assistance, remain significantly neglected.[12] Consider also Chris Smalls, who made national headlines when Amazon fired him shortly after he organized a protest in a warehouse parking lot.[13] Have those would-be organizers found new jobs, health benefits, wages, and pensions since being fired?[14] Attention around the labor movement has largely lost sight of the 130 million nonunion workers struggling to improve their working conditions in the United States.[15]

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10. According to the Cornell School of Industrial Labor Relations' Labor Action Tracker 2022 Annual Report, workers engaged in 424 work stoppages, which involved approximately 224,000 workers and nearly 4.5 million strike days in 2022. Workers in the accommodation and food services industry organized more strikes in 2022 than any other industry, and most of those worker stoppages were led by Starbucks Workers United or the Fight for $15 campaign. Nonunionized workers organized a higher proportion (approximately thirty-two percent) of strikes in 2022 than previous years. *See* Johnnie Kallas, Kathryn Ritchie & Eli Friedman, *Labor Action Tracker 2022*, ILR SCHOOL, https://www.ilr.cornell.edu/worker-institute/labor-action-tracker-2022 [https://perma.cc/J7CX-8A4D] (last visited Oct. 30, 2024).

11. The 2023 "hot strike summer" or "summer of strikes" refers to the record number of workers walking off the job, from writers to hotel workers to UPS workers, reflecting workers' dismay over stagnated hourly pay despite increases in net productivity, skyrocketing corporate profits, deteriorating working conditions including threats to health and safety, increased business group capture in Congress, job automation, the growth of big business, and a new, younger workforce prepared to act to defend their rights. *See* Mary Babic, *How Did We Get to 'Hot Strike Summer' Anyway?*, OXFAM (July 19, 2023), https://politicsofpoverty.oxfamamerica.org/how-did-we-get-to-hot-strike-summer-anyway/ [https://perma.cc/PA4C-2S6Z]; Jaffe, *supra* note 1; Noam Scheiber, *The Radical Guidebook Embraced by Google Workers and Uber Drivers*, N.Y. TIMES (Oct. 10, 2019), https://www.nytimes.com/2019/10/10/business/economy/labor-book.html [https://perma.cc/NH9J-MKHV].

12. For example, Amazon claimed it fired Smalls for violating the company's quarantine policy, but "Smalls alleged . . . that Amazon fired him because of his activism." Shiran Ghaffary, *NYC is Investigating Amazon for Firing a Worker Who Protested Coronavirus Working Conditions*, VOX (Mar. 31, 2020), https://www.vox.com/recode/2020/3/31/21202075/new-york-city-amazon-coronavirus-fired-worker-protest-quarantine-bill-de-blasio-chris-smalls [https://perma.cc/H2X6-XFWG].

13. *Id.* Notably, Chris Smalls has, since his firing, become involved in a powerful grassroots union movement. Nevertheless, his involvement in a nascent union leaves his workplace benefits such as pensions and benefits in a more vulnerable position than when he worked at an established corporation with contractual benefits. Smalls did not elect to leave Amazon and form the union voluntarily; Amazon fired him for organizing the workplace. He has since devoted his time to establishing a union that can assist Amazon workers so that they do not suffer the same conditions he and his colleagues faced. *Id.*

14. The fates of these discharged workers are not necessarily the same, the point is that they are all unpredictable. Some, such as Chris Smalls, continued organizing efforts after discharge, albeit while relying on whatever income nascent unions might offer. *See* Charlotte Alter, *He Came Out of Nowhere and Humbled Amazon. Is Chris Smalls the Future of Labor?*, TIME (Apr. 25, 2022), https://time.com/6169185/chris-smalls-amazon-labor-union/ [https://perma.cc/7V3G-9ERS] (describing how Chris Smalls now leads the Amazon Labor Union, which he created with his friend and colleague, Derrick Palmer).

15. *See* BUREAU OF LAB. STATS., U.S. DEP'T OF LAB., UNION MEMBERS – 2023 (Jan. 23, 2024), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/EZ5C-3Y7E] (offering data on union and nonunion workers in the United States in 2022 and 2023).

While the fates of would-be organizers remain opaque, those of the corporations firing them have fared far better. The drafters of the National Labor Relations Act (NLRA or the Act) once permitted corporations to fire discordant workers, but only if workers' "strife" took the form of inappropriate and disruptive workplace stoppages.[16] Under extant labor law, employers may now fire workers for being uncivil or acting hostile at the workplace with near impunity.[17] Labor doctrine consequently keeps workers vulnerable under employer dominance.

The law is not supposed to protect the dominant at the expense of the vulnerable.[18] Nor was it designed to leave workers like Lexi subject to workplace retaliation. On the contrary, this Article's key claim is that the NLRA,[19] the New Deal's centerpiece labor legislation, sought to protect workers acting in solidarity to countervail management.[20] The drafters considered workplace protest as necessary to engender workplace peace.[21] Nevertheless, the Act is silent concerning the iterative properties of workplace protest. It fails to explain that disruption and challenge generate solidarity among the rank-and-file or that solidarity may lead to formal union organizing and contractual dispute resolution. Consequently, the NLRA relegates the co-constitutive roles of strife and peace to the legal imagination.[22]

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16. *See infra* Part II. For accuracy, this Article uses the terms strife, protest, discord, and disruption interchangeably as a reflection of how those terms are used in contemporary labor cases.

17. *See infra* Part III (arguing that the Biden Board has not gone far enough in its decisions to increase the employers' risk of facing legal repercussions under the NLRA for illegally firing would-be organizers on the shop floor).

18. *See infra* Part II.B.

19. National Labor Relations Act, 29 U.S.C. §§ 151–169.

20. *Id.* § 158(a)(1) (making it unlawful for an employer to "interfere with, restrain or coerce employees" in the exercise of protected, concerted activity); *id.* § 158(a)(3) (making it unlawful for an employer to discriminate "in regard to hire or tenure of employment" based on organizing activities).

21. Drawing from the legislative history, this Article shows how the New Dealers envisioned workplace protections that could embolden worker agitation to engender worker aggregation and collective bargaining. *See infra* Part II.

22. *See infra* Part I, which describes the co-constitutive roles of strife and peace in greater detail. Those roles are baked into the NLRA, whose objectives highlight the interplay between workplace antagonism (strife) and peace. Its section entitled "Findings and declaration of policy" states, in relevant part:

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
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> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers

Without clear Congressional guidance, federal judges and National Labor Relations Board (NLRB) members have narrowed the NLRA's protections for workers protesting the workplace. At the same time, they have broadened and aggrandized the conception of industrial peace.[23] This Article describes those cases, classifying them into four phases for heuristic purposes.[24] It argues that, by narrowing strife protections and broadening peace protections, the NLRB and federal judges radically undermine the potential solidarity and collective identity that worker protest could have generated in the nonunion workplace. Ironically, their labor doctrine undercuts solidarity's more peaceful collective bargaining and dispute resolution system, leading to unpredictable strikes and workplace anger.[25]

A better understanding of how strife generates solidarity and, eventually, bargained-for dispute settlement opens new fronts in the normative critique of labor law. This Article advances a theory of labor organizing to sharpen the focus of that critique on solidarity and collective action.[26] It shows that rank-and-file workers

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> of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

National Labor Relations Act §151.

23. Diana Reddy makes a compelling case for labor law as the "law of apolitical economy," in which workers are relegated to "economic actors" whose movements are distinct from the common good. *See* Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1396 (2023). Scholars have similarly observed the weaponization of peace objectives in other areas central to civil and human rights, namely in segregation policies and anti-civil rights theory. *See generally* Yuvraj Joshi, *Weaponizing Peace*, 123 COLUM. L. REV. 1411 (2023). This Article contributes by explaining how strife is one-half of the story, the other being peace begot through strife.

24. *See infra* Part III.

25. *See* Michael C. Duff, *New Labor Viscerality? Work Stoppages in the "New Work" Non-Union Economy*, 65 ST. LOUIS U. L.J. 115, 117 (2020) ("It is, of course, tidy when labor antagonists conform themselves to facially elegant rules. It is also unusual. For, rules or no rules, lawful or unlawful, when workers get mad enough (or scared enough) about their working conditions, they may simply stop working . . . ."). As this Article later explains, unions and employers often bargain over workplace disciplinary and grievance policies, which are then codified in a collective bargaining agreement. That system of dispute resolution is more predictable, transparent, and equitable than workplace rules written entirely by management, or ad hoc work stoppages. Nevertheless, a significant and residual obstacle to such workplace peace concerns legal incentives to reach a bargaining agreement. As it currently stands, labor law permits employers to refuse to bargain over important workplace issues or otherwise reach an impasse precluding agreement. Labor law scholars have convincingly accused the Supreme Court and NLRB of elevating employer's property rights over the rights of unions, including by rejecting calls to demand bargaining. *See, e.g.*, Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It*, 45 B.C. L. REV. 125, 134–35 (2003). While acknowledging that conversation, this Article contributes to the discourse around declining worker power by focusing on antecedent worker mobilization and solidarity that precedes organizing and bargaining.

26. This piece benefits from a steady stream of movement law scholarship urging legal scholars to "break the molds of political discourse, project new possible futures, and create terrains of engagement for more people." *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 827 (2021). It seeks to advance the conversation around movement theory and movement law by engaging with the distributional potentiality of movement at the shop floor through generative solidarity and organizational resistance. It thus differs from other work, such as an article by Kate Andrias and Benjamin Sachs, examining ways social movement theory could inform broader civic engagement and spur policymakers to adopt progressive legislation. *See* Kate Andrias &

must overcome significant risks to their job security if they try to disrupt management's presumed invincibility at the workplace.[27] It explains that, at the outset, workers need statutory protections to embolden their challenge.[28] That challenge attracts a following among those seeking to strengthen their power through numbers. If organizing occurs, workers bargain collectively with their employers over working conditions,[29] rather than have those conditions imposed upon them.

It is time to pay attention to workplace strife and its judge-made limitations imposed in the name of peace.[30] Labor doctrine increasingly requires nonunion workers to figure out, amongst themselves, how to challenge the status quo, protect one another from arbitrary workplace discipline, and build power on the shop floor.[31] In the paradigmatic *Lechmere* case, the Supreme Court held that employers are not statutorily required to allow union organizers onto their property.[32] The Court went further in its 2021 decision in *Cedar Point Nursery v. Hassid*[33] when it invalidated a California statute granting organizers the right to enter the employer's

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Benjamin I. Sachs, *The Chicken-and-Egg of Law and Organizing: Enacting Policy for Power Building*, 124 COLUM. L. REV. 777, 781–82 (2024).

27. *See, e.g.*, Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 130, 618 (2021) ("If participants believe that the current regime is invincible, they are unlikely to participate in an organizing campaign designed to change . . . [but] if individuals can be shown that the current structure is subject to challenge—that it is vulnerable to the efforts of an organized opposition—then participation becomes more plausible."); Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 TEX. L. REV. 351, 364 (2017) ("If workers believe that management, which supports nonunion governance, is invincible, then workers will not attempt to unionize; if workers think management is susceptible to unionization, organizing becomes possible.").

28. *See* Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 492 (1992) ("[B]y fostering unions and collective bargaining, the law allows workers to elevate their bargaining power to a position of rough parity with their employer's and affords them the opportunity to make a productive contribution to the governance of the workplace.").

29. *See* Cynthia Estlund, *Employment Rights and Workplace Conflict*, *in* THE OXFORD HANDBOOK OF CONFLICT MANAGEMENT IN ORGANIZATIONS 53, 55 (William K. Roche, Paul Teague & Alexander J.S. Colvin eds., 2014).

30. Pathbreaking scholarship highlights the role of the NLRA in protecting the nonunion workplace more generally. *See, e.g.*, Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1675–77 (1989) ("[B]ecause so many more nonunion, as compared to union, establishments exist today, the Board's presence is more important to nonunion establishments and their employees than ever before."); Matthew W. Finkin, *Labor Law by Boz—A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 IOWA L. REV. 155 (1987).

31. *See* Duff, *supra* note 25, at 117 ("But especially if not represented by a union, these workers may not know (and temporarily, as a result of inflamed passions, may not care to know) the legal risks entailed in particular courses of action."). Unaffiliated with any unions, Chris Smalls and others created the Amazon Labor Union (ALU) and have since worked to organize Amazon facilities "without any professional organizing experience, without any formal affiliation with established organized labor, and without big money behind them." *See* Alter, *supra* note 14.

32. Lechmere, Inc. v. NLRB, 502 U.S. 527, 539 (1992) (reaffirming that the only exception to non-trespassory access to employees is "where the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate to them").

33. 594 U.S. 139 (2021).

property to meet with workers.[34] These decisions make it nearly impossible for union organizers to reach workers at nonunion workplaces.[35] Statutory and doctrinal restrictions on union assistance and secondary protest action[36] also mean nonunion workers cannot count on community support.

This Article is about nonunion workers, how labor doctrine undermines their solidarity, and why doctrinal and statutory reforms are needed to achieve the New Deal's vision of labor relations. It is organized as follows:

Part I provides the theoretical scaffolding, explaining why labor doctrine must account for workers' behavior and risk calculus before organizing takes shape. Doing so engenders a labor mobilization process[37] in which a single or group of nonunion workers feels emboldened to challenge the status quo dominance, demand change, and form a collective framework capable of regulating future disputes.

Part II describes the historical role of law in empowering or disincentivizing workplace mobilization. Without legal protections for workers' strife, as illustrated in the years leading up to the NLRA, employers and courts employ real and legal violence, raising the stakes of workplace resistance.[38] The New Dealers sought to safeguard industrial peace and the workers who risked their lives and livelihoods to gain a voice at the workplace.[39]

Part III charts the evolution of labor doctrine concerning workplace strife and peace. The NLRA's early cases appreciated strife for its generative properties and protected nonunion workers accordingly.[40] The NLRB and federal courts gradually reduced protections for protesting workers in the name of an increasingly broad

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34. *Id.* at 9 ("'The right to exclude is 'one of the most treasured' rights of property ownership.").

35. *Id.*

36. *See, e.g.*, Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. LAB. L. 277, 293–322 (2015) (arguing that the NLRB's restrictions on labor picketing are unconstitutional); Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1958*, 24 LAW & HIST. REV. 45, 93–95 (2006) (describing congressional reactions to sit-ins and the role of such conduct on the making of labor law); Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 79–81 (2010) (describing how Congress and the courts used the sit-down strike to narrow the more general right to strike); Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 687–89 (1985) (arguing that restrictions on political strikes illustrate how labor law has been "[s]evered from its democratic roots"); Craig Becker, *Better Than a Strike: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 354–56 (1994) (acknowledging the doctrinal restrictions on the right to strike while arguing that labor law protects repeated grievance strikes); Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845, 1855–60 (2017) (describing statutory restrictions on picketing).

37. The term "mobilization" means "how people who at a given point in time are not making contentious claims start to do so." *See* CHARLES TILLY & SIDNEY TARROW, CONTENTIOUS POLITICS 38 (2nd ed. 2015). The terms "labor mobilizing" and "labor mobilization" are used here to refer to the process by which previously quiescent workers combine and begin to assert grievances or demands to their employers.

38. *See infra* Part II.A.

39. *See infra* Part II.B.

40. *See infra* Part III.A.

understanding of industrial peace.[41] The Biden administration's NLRB sought to overturn those cases but failed to reinstate the NLRA's earliest standards that had emboldened nonunion workers to fight for collective action.[42] The law leaves nonunion workers vulnerable to retaliation for challenging managerial dominance.

Part IV concludes by urging the Board, courts, and Congress to implement a theory of labor organizing capable of protecting nonunion workers. It also proposes specific modifications to the draft Protecting the Right to Organize Act of 2021 (PRO Act),[43] discusses the doctrinal and ideological support for these proposals, and anticipates and responds to potential objections. In doing so, it notes that not all trouble is good trouble.[44] Some disruptive behavior at the workplace is entirely unrelated to organizing and merely intended to inflict harm or express displeasure.[45] Other conduct is abusive, violent, or violates protections afforded to protected classes. Workers sometimes engage in protest but not generative, collective protest that this Article seeks to protect. The solution is not, consequently, to condone all antagonistic activities but rather to carve out protections for nonunion workers' protests carried out to strengthen workplace policies and better distribute the gains from capital to labor.

I. PEACE AND WAR ON THE SHOP FLOOR

This Part offers a theory of labor organizing to explain why workplace disruption occurs, how workers generate solidarity among nonunionized workers, and how workers so organized might negotiate channels for future protest. It begins by stressing that workers often express considerable discord at the workplace before unionizing. Social movement studies—examinations of grassroots movements that lack formal political power—have long elucidated how individuals mobilize that discord to form a community of resistance. At the workplace, workers often direct

41. *See infra* Part III.B–C.

42. *See infra* Part III.D.

43. Richard L. Trumka, Protecting the Right to Organize Act of 2023, H.R. 20, S. 567, 118th Cong. (2023) (providing greater protections for workers during union elections and raising penalties for labor law violations).

44. As the late John Lewis famously instructed, "Get in good trouble, necessary trouble, and redeem the soul of America." Devan Cole, *John Lewis Urges Attendees of Selma's 'Bloody Sunday' Commemorative March to 'Redeem the Soul of America' By Voting*, CNN (Mar. 1, 2020), https://www.cnn.com/2020/03/01/politics/john-lewis-bloody-sunday-march-selma/index.html [https://perma.cc/VYV5-RYY8]. Lewis' instruction drew from his experiences during the 600-person civil rights march in Selma, Alabama, in 1965 when law enforcement officers beat peaceful protesters, including Lewis, to the point of hospitalization. Throughout his lifetime, Lewis urged young voters to speak up and assist social movements to push for transformative change in America. *See* Rashawn Ray, *Five Things John Lewis Taught Us About Getting in 'Good Trouble'*, BROOKINGS (July 23, 2020), https://www.brookings.edu/articles/five-things-john-lewis-taught-us-about-getting-in-good-trouble/ [https://perma.cc/T82G-L8CD].

45. That concern holds particularly true in view of cases excluding millions of workers from the NLRA's protections by classifying them as supervisors, even though many of those workers have no "agency in their own work lives" or working conditions. *See* Sharon Block, *Go Big or Go Home: The Case for Clean Slate Labor Law Reform*, 41 BERKELEY J. EMP. & LAB. L. 167, 173 (2020).

their discord and resistance at management. Doing so requires nonunion workers to take an enormous risk. Do they compromise their job security to build their power? Or do they accept their treatment and ensure their families remain fed, their children are in school, and their mortgages are paid?

Benjamin Sachs[46] and others[47] have explored how labor law contributes to that risk calculus.[48] The more vulnerable a worker is to an employer's retaliation, the more futile it may appear to stand up to the "invincible" employer and the riskier the protest.[49] The risk declines if the law offers nonunion workers statutory protections when challenging their employer.[50] Workers who witness other workers stand up to management may be more likely to join protest efforts, emboldened by what they see and experience

A. The Processes of Solidarity

This Section describes the processes inherent in generating solidarity at the nonunion workplace, drawing from collective mobilization and social protest theory. The law's subordination of collective action to peace is neither unique nor confined to labor.[51] Collective and social movements offer rich lessons concerning how rank-and-file workers generate solidarity and the role of the law in undermining or encouraging strife.[52]

For instance, Mancur Olson's early microeconomic analysis suggests that

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46. *See* Sachs, *supra* note 27, at 356–58 (drawing from social movement theory to articulate a political process theory for labor organizing).

47. *See, e.g.*, Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 357–58 (2012) ("[I]t is an article of faith among union organizers that workers are far more likely to organize when they are angry, and less so when they are fearful.").

48. There is a growing labor law literature that draws on social movement theory to explicate and critique labor law and movements. *See, e.g.*, Ariana R. Levinson, *Breaking New Ground: Social Movement Theory and the Cincinnati Union Co-ops*, 34 EMPL. RESP. RTS. J. 213, 225–35 (2022) (explaining social movement mechanisms and how they can aid the understanding of a union co-op movement); Rogers, *supra* note 47, at 348–55 (using union organizing manuals and "academic studies of organizing efforts from within ethnography and social movement theory").

49. *See* Sachs, *supra* note 27, at 364 ("If workers believe that management, which supports nonunion governance, is invincible, then workers will not attempt to unionize; if workers think management is susceptible to unionization, organizing becomes possible.").

50. *Id.*

51. Despite the similarities between social movements and labor movements, federal law treats the two differently by granting the former broader protections under the First Amendment. *See, e.g.*, NAACP v. Clairborne Hardware Co., 458 U.S. 886, 907–10 (1982) (finding a number of protest activities during a civil rights boycott safeguarded by the First Amendment). This Article is not drawing a comparison of legal treatment but, rather, explains the sociology of mobilization in both contexts.

52. *See* Clarence Y.H. Lo, *Communities of Challengers in Social Movement Theory*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 224, 225 (Aldon D. Morris & Carol McClurg Mueller eds., 1992); Francesca Polletta & James M. Jasper, *Collective Identity and Social Movements*, 27 ANNU. REV. SOC. 283, 284 (2001); RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 1–10 (1965) (describing their behavioral analytical framework to assess bargaining at the workplace); JOHN KELLY, RETHINKING INDUSTRIAL RELATIONS: MOBILIZATION, COLLECTIVISM AND LONG WAVES 24 (1998) (explaining that the research agenda behind mobilization theory "maps very closely onto the central problems of industrial relations").

collective benefits—higher wages, safe working conditions, guaranteed time off—are alone insufficient to motivate individuals to fight for their rights.[53] Workers, like any other, must be galvanized into collective action.[54] Viewed accordingly, solidarity "is not only a means to an end but a fulfillment"[55] in which participation becomes an "achievement in its own right."[56] An appreciation for "the operation of face-to-face encounters and group dynamics"[57] synthesizes with the NLRA's original workplace speech and resistance protections, discussed later. It also suggests that the NLRA's subsequent doctrinal hurdles—removing protections for disruptive or uncivil behavior—significantly chill those dynamics and their potential to garner peace.

B. An Organizing Typology

This Section offers a typology of organizing processes to understand how a single, nonunion worker's challenge of the dominant status quo generates workplace solidarity. The factors within this typology are interactive: There are no distinct lines, for instance, between a minority's decision to demand change and the collective identity framing. Nor does this Article suggest through typology that these characteristics appear in any definitive order. Instead, those factors—a *challenge to the status quo* and *demand for change*—reflect processes and mechanisms[58] that generate collective action[59] and, through such action, a more peaceful bargaining regime. That process also highlights the significance of legal protections. When the law fails to protect workers seeking to mobilize the workplace, it renders would-be organizers vulnerable to discharge, thus enabling management to remove them from the workplace while sending a clear warning to the rank-and-file to remain obedient.

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53. *See* Aldon D. Morris & Carol McClurg Mueller, *Building Social Movement Theory*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 3 (Aldon D. Morris & Carol McClurg Mueller eds., 1992) (describing Olson's theory as a "major factor" in the shift from rational actor to resource mobilization).

54. Polletta & Jasper, *supra* note 52, at 284.

55. *See, e.g.*, William A. Gamson, *The Social Psychology of Collective Action*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 53, 56 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

56. *Id.* at 60.

57. *Id.* at 72.

58. For a description of *processes* ("regular combinations and sequences of mechanisms that produce similar . . . transformations of those elements") and *mechanisms* ("delimited class of changes that alter relations among specified sets of elements in identical or closely similar ways over a variety of situations"), see TILLY & TARROW, *supra* note 37, at 29–30. The authors note that, although processes and mechanisms appear frequently throughout social movements, they lend themselves to significant variations and frequencies. *Id.* at 29–31.

59. *See generally* SIDNEY G. TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 185–88 (3rd ed. 2011) (describing the various components of social movement as interactive mechanisms that are "compound into processes, regular combinations and sequences of mechanisms that produce similar transformations"); TILLY & TARROW, *supra* note 37, at 27 (describing various movements as involving "many different forms and combinations of collective action").

1. Challenge Status Quo Legitimacy

A preliminary step in generating solidarity among workers is challenging the legitimacy of the employer's dominance.[60] Charles Tilly,[61] William Gamson,[62] Richard Cloward, and Frances Fox Piven,[63] among others,[64] argue that previously atomized individuals form connections[65]—a transformation of sorts into a *we* versus *them*—structured around alliances and conflict.[66] Workers who otherwise accept management's authority and legitimacy begin to view the status quo power imbalance as unjust.[67]

Nonunion workers who seek to challenge management do so by encouraging their fellow rank-and-file to view their interests as conflicting with interests imposed upon them.[68] A successful organizing act, referred to as a "divesting"[69] or "disruptive" action,[70] will "break the bonds of authority that keep people quiescent."[71] That process demonstrates that management is vulnerable to resistance and that positive change is feasible.[72]

Like anyone else, workers calculate whether their actions' potential benefits outweigh their potential costs.[73] On the one hand, workers risk their jobs when challenging management, particularly if their gamble fails to pay off and workers

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60. *See* Bert Klandermans, *The Social Construction of Protest and Multiorganizational Fields, in* FRONTIERS IN SOCIAL MOVEMENT THEORY 78 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

61. *See* CHARLES TILLY, FROM MOBILIZATION TO REVOLUTION 3, 4, 6 (1978).

62. *See* Gamson, *supra* note 55, at 74.

63. *See* FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: HOW THEY SUCCEED, HOW THEY FAIL 3–4 (1979) (arguing that protest movements begin when "the system" loses its legitimacy).

64. *See* Klandermans, *supra* note 60, at 78; TARROW, *supra* note 59, at 27.

65. *See, e.g.*, TILLY & TARROW, *supra* note 37, at 31.

66. *See* TARROW, *supra* note 59, at 31.

67. *See* PIVEN & CLOWARD, *supra* note 63, at 4 (arguing that people "who ordinarily accept the authority of their rulers and the legitimacy of institutional arrangements come to believe in some measure that these rulers and these arrangements are unjust and wrong").

68. The "we" that movements such as labor construct is adversarial. *See* Gamson, *supra* note 55, at 57. As Gamson argues, collective identity is but "one step" in challenging the elite paradigm. "The content must necessarily be adversarial in some way to smoke out the invisible and arbitrary elements of the dominant cultural codes." *Id.* at 60. Collective action is thus the "medium" that challenges the elite and dominant codes and presents alternatives. *Id.* at 57.

69. *Id.*

70. *See* TARROW, *supra* note 59, at 99 (arguing that "disruptive" collective actions "break with routine, startle bystanders, and leave elites disoriented, at least for a time").

71. *See* Gamson, *supra* note 55, at 72.

72. *See* WALTON & MCKERSIE, *supra* note 52, at 2–4 ("[T]he agenda in labor negotiations usually contains a mixture of conflictual and collaborative items."); KELLY, *supra* note 52, at 4 (centering the assessment of industrial relations on "interests and power, conflict and cooperation"); Rogers, *supra* note 47, at 356 (highlighting the importance of identifying collective grievances and attributing those grievances to the employer as a precondition to collective workplace action). *But see* JANE F. MCALEVEY, NO SHORTCUTS 14 (2016) (arguing that there are "very significant factors" that differentiate labor from other social movement efforts, including the fact that "[t]oday's organizers . . . don't face conditions anything like today's union organizers").

73. *See* Gamson, *supra* note 55, at 57 (arguing that people "make strategic judgements based on their expectations about costs and benefits").

refuse to join in solidarity. On the other, the more workers divest management of perceptions of invincibility while seeking better conditions, the greater the possibility they will gain additional followers.[74] Workplace mobilization is thus dynamic and builds as workers perceive that their group action can improve their conditions.[75]

To illustrate the generative power of confrontation, Rick Fantasia provides an example of a wildcat strike at a small iron foundry.[76] One day, Richie, a beloved fellow maintenance worker with whom most had worked for several years, was caught sleeping on the job and fired. The other unit members became visibly upset, not because they were surprised Richie fell asleep (Richie was, apparently, no stranger to the grape), but because the employer had failed to follow the collective bargaining agreement's disciplinary procedures. Without having had the opportunity to discuss the matter, a welder went from workstation to workstation shouting, "Shut it down . . . maintenance is walking out and we're gonna shut the whole place down!"[77] Fantasia observes that "contrary to the romanticized images of workers acting in forceful union, there was definite hesitation" among some workers and "extreme tension . . . because the level of activity and participation was uneven."[78] Some did not want to "step over the line" until "it became reasonably certain that their jobs would be protected by the force of numbers."[79] The participating group verbally confronted the foreman, both to show reluctant and timid workers that "the group was strong enough to express its defiance" and to "create an appearance of unanimity."[80]

Fantasia recounts that the workers' eventual decision to unify and confront management achieved two purposes. First, it catalyzed further collective action by showing the workers on the shop floor that they could resist the dominant company narrative. Second, the maintenance workers' decision "served to communicate to management that efforts to demoralize the workers and dissipate their mood were futile."[81] Their display paid off. The workers united and moved through the exit, forcing the foreman to change tactics from threatening the individual lead workers to threatening to call the police on "the group as a whole."[82] Unwilling to risk production by punishing the entire group of workers, management changed its mind and reinstated Richie the next morning.[83]

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74. *Id.* at 72 (arguing that groups augment which "increases the capacity of the potential challengers to act as a unit").

75. *See* Klandermans, *supra* note 60, at 86 (arguing that there must be a "belief that the challengers' collective action can eliminate their grievances"). To mobilize those identities, "individuals must make it part of their personal identity." *See* Gamson, *supra* note 55, at 74.

76. *See* RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 82 (1989).

77. *Id.*

78. *Id.* at 83–84.

79. *Id.* at 85.

80. *Id.*

81. *Id.* at 92.

82. *Id.* at 85–88.

83. *Id.* at 91.

The workers in Richie's unit had little incentive, apart from their loyalty, to disrupt their standard work-life patterns.[84] Some decided to join efforts to support Richie only after witnessing solidarity form on the shop floor. In Richie's case, management would have gladly fired the initial protestors, but before they could do so, the protesting workers had gained a substantial following. Richie was luckier than Lexi Rizzo and Chris Smalls. Not all protesting workers enjoy sufficient shop floor support prior to their workplace discipline. When labor doctrine permits employers to retaliate against the original protestors through discharge or discipline, as in Lexi's case, workers witness discharges rather than success—experiences that shape their risk calculus, deterring the types of emboldened action Fantasia describes.

2. Demand Change

Fantasia's example suggests that workers must not only share common grievances but also collectively demand change (in that case, change the unilateral decision to fire Richie).[85] Labor mobilizing is thus "deeply involved in the work of 'naming' grievances, connecting them to other grievances, and constructing larger frames of meaning" capable of resonating with the minority population and communicating "a uniform message to power holders and to others."[86]

As with challenging the status quo, studies suggest that workers' decisions to demand change reflect perceived risk calculus.[87] For instance, workers speak among themselves about the potential costs and results of strike action before making demands.[88] Their calculations shift under a collective identity by augmenting the personal benefits of goal achievement and social rewards.[89] Fantasia refers to this phenomenon as developing "cultures of solidarity" that arise among the wider culture to absorb "oppositional practices and meanings."[90] Resulting collective action "embodies a transformative potential when it can achieve a degree of independence from the institutional structures designed to contain it."[91] Brishen Rogers argues that when "such actions spark changes in the workplace conditions, workers can become

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84. *See* Michael Goldfield & Cody R. Melcher, *The Myth of Section 7(a): Worker Militancy, Progressive Labor Legislation, and the Coal Miners*, 16 LABOR 49, 62 (2019) ("[W]orkers have no reason to break with their normal pattern of life and 'preference maximization' unless they are given intense (external) incentive to do so.").

85. *See also* KELLY, *supra* note 52, at 27 ("Dissatisfaction may be necessary to motivate collective action but it is not sufficient."); Gamson, *supra* note 55, at 73; PIVEN & CLOWARD, *supra* note 63, at 4 (noting that, in this second stage, "people who are ordinarily fatalistic, who believe that existing arrangements are inevitable, begin to assert 'rights' that imply demands for change").

86. *See* TARROW, *supra* note 59, at 144; David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 133, 136 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

87. *See* KELLY, *supra* note 52, at 33; Klandermans, *supra* note 60, at 93.

88. *Id.* at 34.

89. *Id.*

90. *See* FANTASIA, *supra* note 76, at 17.

91. *Id.* at 19.

'the agents of their victory,' reinforcing their sense of collective identity and power."[92]

C. Peace (and Strife) Through Bargaining

This Article has thus far synthesized the mobilization literature to explain the risk calculus of nonunion workers on the shop floor seeking solidarity. This Section advances that literature by explaining why solidarity and the divesting actions that engender it may result in more peaceful workplaces, and how those workplaces might empower strife while channeling it through collective bargaining and dispute resolution.

Before doing so, however, a caveat. Collective bargaining at the workplace is no panacea. Legal barriers to collective bargaining persist, rendering workers' efforts to negotiate with their employers and codify agreements in a first contract incredibly difficult.[93] This Section does not idealize that process nor undermine the practical hardships confronting pro-worker negotiators.

Notwithstanding legal barriers, or perhaps because of them, collective bargaining should be conceptualized as the pathway to workplace peace. The employer and workers (once having formed a collective) may negotiate various workplace procedures through bargaining. Those procedures could address disputes between workers and between workers and management, offering a clear avenue to express discontent. For example, a bargained-for agreement could stipulate monthly meetings in which management meets with workers or worker representatives to listen to grievances and establish agreeable solutions, accompanied by means to elevate unresolved disputes. An agreement could also explain to workers how to address urgent workplace matters, such as faulty machinery or hazardous working conditions. Furthermore, agreements could define disciplinary action in the event of specific, bargained-over misconduct, presumably stipulating dispute resolution modalities such as arbitration or mediation.

Discipline administered accordingly protects workers and employers. Workers are protected by having available avenues to express their protest, and employers have agreed-upon procedures subject to contractual dispute resolution. Employers may resist sitting at the negotiating table to discuss workplace protest and discipline—an ongoing and unfortunate reality of the modern workplace.[94] Nevertheless, workers' economic power and leverage to entice management to do so are more potent if workers act collectively rather than atomized. Employers may also be motivated to carve out such an agreement if labor doctrine restrains their

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92. *See* Rogers, *supra* note 47, at 355 (internal citations omitted).

93. *See, e.g.*, Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 47 (2009) ("About half of all newly certified or recognized unions are not able to persuade the employer to agree to a collective bargaining agreement.").

94. *See* Celine McNicholas, Margaret Poydock, & John Schmitt, *Workers are Winning Union Elections, but it Can Take Years to Get Their First Contract*, ECON. POL'Y INST. (May 1, 2023), https://www.epi.org/publication/union-first-contract-fact-sheet/ [https://perma.cc/5CXU-DWY9] ("All the available data, however, show that reaching a first contract generally takes a long time—often a year or more after union recognition. And, in some cases, no contract is ever signed.").

discretion to fire or discipline protesting employees. The next Part describes how the New Dealers envisioned such a co-constitutive regime of strife and peace and sought to instill it in the NLRA.

II. LEGISLATING STRIFE, PEACE, AND BARGAINING

Workers have always organized through agitation. This Part describes the pre-NLRA period, when legal restrictions on worker combinations led to economic instability, unrest, and violence. That workplace strife contributed to the New Dealer's NLRA framework, which recognized and sought to protect the co-constitutive roles of strife and peace. Since the NLRA's enactment, however, judges and Board members have interpreted protections for nonunion workers' agitation out of the NLRA and have recharacterized peace's role as omnipresent. Workers' vulnerabilities and risk calculus under current labor doctrine thus resemble the pre-NLRA era. Nonunion workers must decide, now as they did before the NLRA entered into force, whether to accept their unfair working conditions or risk their jobs by demanding change.

A. The Pre-NLRA Workplace

In the early nineteenth century, as workers and employers clashed during organizing campaigns, both sides engaged in real, not just rhetorical, violence.[95] Employers hired men to hurt and intimidate workers who were attempting to organize.[96] Newly minted unions and worker organizations responded by engaging in widespread strikes under the philosophy: "If we cannot do it peacefully, we do it otherwise."[97] Some were "jailed, beaten, and lynched for their labor agitation."[98]

Pre-NLRA labor cases characterized workers' organizing efforts as a direct threat to public safety.[99] Deeply influenced by English common law, American judges treated *any* combination of workers seeking to improve their workplaces as de facto illegal, even those that were peaceful.[100] The position of judges towards a

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95. *See, e.g.*, Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 204–05 (1921) (dealing with picketing accompanied by violence); FANTASIA, *supra*, note 76, at 42 ("From 1918 to 1920 the struggles of many American workers were notable for their ferocity, but so was the official repression mounted against them . . . ."); MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 40 (1987) ("The United States is not merely characterized by a high level of strike activity, but by a comparatively high level of violence in labor-management conflict throughout its history.").

96. *See* FANTASIA, *supra* note 76, at 41 (describing employers' anti-union tactics, in which early unionists "were jailed, beaten, and lynched for their labor agitation").

97. HOWARD KIMELDORF, BATTLING FOR AMERICAN LABOR: WOBBLIES, CRAFT WORKERS, AND THE MAKING OF A UNION MOVEMENT 33 (1999).

98. FANTASIA, *supra* note 76, at 41.

99. *See* Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 568 (2014) ("The judiciary equated labor union protests [particularly picketing] with violence . . . .").

100. *See* Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REV. 1257, 1258 (1989); *see also* Commonwealth v. Pullis (Phila. Mayor's

working class that threatened to combine and empower each other is not surprising.[101] As property owners, themselves, judges had a lot to lose.[102]

Following the railway strikes of 1877 that spanned Baltimore to San Francisco, judges became "resolved to insure society against a labor revolution by dint of the injunction, the outlawing of the boycott, and like measures."[103] Criminalizing workers' collective action for causing injury to the public, "the courts' harshly repressive law of industrial conflict helped make broad, inclusive unionism seem too costly and a more cautious, narrower unionism essential."[104] Workers and labor leaders were forced to think differently about the law and their place within it.[105]

Deprived of an enabling legal environment, workers at that time often followed a "militant minority" that seized opportunities to attract a loyal following. Their confrontational, collective actions were a critical response to the mobilization of employers and judges to weaken strike action by legitimizing strikebreakers, violently repressing strikers, and unleashing military and paramilitary brutality.[106]

The legal culture and anti-collective action narrative that gripped the courts and enjoined worker mobilizing significantly affected labor organizing. And while civil and criminal laws purported to distinguish violent and threatening acts from those intended to persuade, judges "recognized no such distinctions" and instead deemed all collective actions "inherently intimidating."[107]

B. The National Labor Relations Act (NLRA)

The original scope and intention of the NLRA was to protect workers who sought to foster solidarity and bargain collectively. When the NLRA was enacted in 1935, scholars heralded its bold passage and potential to rebalance the power asymmetries between labor and capital.[108] As Catherine Fisk and Jessica Rutter note,

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Court, 1806) (responding to collective action by fining and imprisoning antagonistic workers under a doctrine of criminal conspiracy).

101. *See* Crain and Matheny, *supra* note 99, at 567 ("In the nineteenth and early twentieth centuries, most American judges came from privileged backgrounds that made them naturally suspicious of class-based activism.").

102. *See* Marion Crain, *Assembly and Collective Rights*, *in* THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 221, 222 (Richard Bales & Charlotte Garden eds., 2020) ("The privileged background of the judicial elite made them naturally suspicious of class-based activism, ensuring that court decisions consistently prioritized the rights of the propertied class over those of unions and workers.").

103. *See* SELIG PERLMAN, A THEORY OF THE LABOR MOVEMENT 159 (1928); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1130–33 (1989) (describing how judges ensured that they, and not legislatures, were the key authority over labor matters).

104. *See* Forbath, *supra* note 103, at 1116.

105. *Id.* ("[L]abor leaders at all levels began to speak and think more and more in the language of the law.").

106. *See* FANTASIA, *supra* note 76, at 20, 39.

107. *See* Forbath, *supra* note 103, at 1188.

108. *See* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265 (1978) (describing the NLRA as "perhaps the most radical piece of legislation ever enacted by the United States Congress."); Getman, *supra* note

the NLRA had no restrictions on labor protest in its original form.[109] On the contrary, under Section 13, the NLRA codifies workers' fundamental right to strike.[110] Additionally, under Section 7, the Act enshrines the right of workers to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[111] To be protected, the employees' activities must nevertheless be "concerted" for "mutual aid or protection."[112] Under Section 8, the NLRA prohibits employer interference, coercion, and restraint of employees' protected Section 7 activities.[113]

1. Strife and Peace

Although the Act's text is sufficiently broad to encompass conduct that precedes unionization,[114] it is silent about behavior specifically in the nonunionized workplace. Assessing the NLRA's original intention is, therefore, complex.[115] The statutory intent "is often vague and inconclusive, and on many issues that were subsequently the subject of burning debate, Congress simply expressed no legislative intent."[116] On the one hand, the NLRA negotiations and text suggest that workers should combine and

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25, at 125 ("Many aspects of the new law were innovative, its provisions were powerful, and its scheme for enforcement was carefully chosen."); GOLDFIELD, *supra* note 95, at 1257–58 (noting scholarly adjectives of the NLRA, such as "radical," "revolutionary," and "one of the most drastic legislative innovations of the decade").

109. *See* Fisk & Rutter, *supra* note 36, at 284.

110. National Labor Relations Act § 13, 29 U.S.C. § 163.

111. *Id.* § 157.

112. *See* Morris, *supra* note 30, at 1679.

113. 29 U.S.C. § 158(a)(1).

114. *Id.*

115. *See* Crain & Matheny, *supra* note 99, at 574 (noting that the NLRA is "a product of political compromise" and "ambiguous"); JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF LABOR RELATIONS POLICY, 1947-1994 2 (1995) ("Congressional intent, as expressed in the language of the new labor law, was ambiguous . . . many new provisions were the result of legislative compromise . . . ."). Nevertheless, the role of industrial peace has long captured the attention of labor law scholars. *See, e.g.*, Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 975 (1992) ("One final congressional objective—'labor peace'—calls for comment because it has come to loom so large in the common understanding of the Wagner Act."). That attention likely stems from the fact that the bill, as initially drafted, stipulates: "The first objective of the bill is to promote industrial peace." *See* 79th Cong. Rec. 6749, (May 1, 1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2300 (1949) (initial bill as introduced by Sen. Wagner). Representative O'Conner similarly declared that "[t]he whole story in this bill from our viewpoint, from the point of view of the Committee on Labor, and the point of view of the Senate when it passed the bill, is to bring about industrial peace, peace between capital and labor." 79th Cong. Rec. 9668–9669, 9676–9683 (June 19, 1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3112 (1949) (statement of Rep. O'Conner).

116. *See* Klare, *supra* note 108, at 281. For a succinct description of the competing interpretations of the Act's intentions, see Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyersling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 286–87 (1987).

act peacefully in their pursuit of recognition. On the other hand, the NLRA protects the fundamental right of those workers to engage in the most disruptive form of industrial warfare within their arsenal (strike action).[117]

One of this Article's central claims is that the drafters were cognizant of that paradox. What's more, they intended to resolve it by protecting disruptive action in the short term *as a means to achieving peace* in the long term.[118] The drafters knew that "the denial of the right to organize and bargain collectively was the source of the most fractious and bloody types of industrial disputes."[119] By protecting the right to engage in short-term strife, the drafters hoped to limit more dangerous strikes, acknowledging that "[m]en versed in the tenets of freedom will become restive when not allowed to be free."[120] In other words, the drafters were aware that strife and peace are co-constitutive—an awareness that has since been lost, leaving worker strife unprotected.

2. Industrial Democracy

Strife and peace serve as bookends to labor organizing. However, as the New Dealers aptly recognized, there were a series of interconnected rights and objectives that federal labor law needed to protect to strengthen workers' agency at the workplace. Importantly, apart from safeguarding antagonism, the NLRA's drafters sought to give workers "a voice in decisions which affected their working lives . . . thereby strengthening and enriching political democracy."[121] Industrial democracy,

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117. 29 U.S.C. § 163 (Right to strikes preserved). Indeed, Senator Wagner theorized that, owing to the NLRA's balance between strikes and labor arsenal, critics would "complain that it does not go far enough and that it will not insure industrial peace." 78th Cong. Rec. 10351 (June 4, 1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 21 (1949) (statement of Sen. Wagner).

118. *See* Theda Skocpol, Kenneth Finegold & Michael Goldfield, *Explaining New Deal Labor Policy*, 84 AM. POL. SCI. REV. 1297, 1298 (1990) ("The NLRA's sponsors believed that industrial peace could come only after the rights of independent labor unions were strengthened, a process that they realized might entail bitter conflicts with business.") (internal citations omitted). Tellingly, the NLRA's draft preamble, as written in the Act's third draft, states in relevant part:

> Inadequate recognition of the right of employees to bargain collectively through representatives of their own choosing has been one of the causes precipitating strikes, lockouts, and similar weapons of industrial strife, with consequent injury to interstate commerce. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate commerce by removing the obstacles which prevent the organization of labor for the purpose of cooperative action in maintaining their standards of living, by encouraging the equalization of the bargaining power of employers and employees, and by providing agencies for the peaceful settlement of industrial disputes.

See Casebeer, *supra* note 116, at 311, n.73 (internal citations omitted).

119. *Id.* at 319.

120. 79th Cong. Rec. 7565 (May 16, 1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2334 (1949) (statement of Sen. Wagner).

121. *See* GROSS, *supra* note 115, at 1 (describing Senator Wagner's emphasis on "the struggle for a voice in industry through the process of collective bargaining"); Wilma B. Liebman, *The Revival of American Labor Law*, 34 J.L. POL'Y 291, 295 (2010) (noting that this objective envisaged "a workplace where workers had a voice in shaping the terms and conditions of their employment"); Charles J.

in turn, was thought to augment the benefits of collective bargaining by ensuring that workers enjoy "a sense of worth, freedom, and of participation that democratic government promises them as citizens."[122] Senator Wagner maintained that "[m]ajority rule, with all its imperfections, is the best guaranty of workers' rights, just as it is in the surest guaranty of political liberty that mankind has yet discovered."[123] More broadly, therefore, democratic participation in the workplace was thought to contribute to greater democratic participation in political society.[124]

3. Collective Action

In accommodating Wagner's vision of strife and peace, the NLRA expressly recognizes that "protection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes."[125] To obtain peace and cooperation, the drafters posited, employers and employees had to "possess equality of bargaining power."[126]

Somewhat provocatively, Kenneth Dau Schmidt argues that the NLRA's emphasis on the collective bargaining model

> suggests that the government should attempt to minimize the extent to which the parties engage in strategic behavior. Such behavior is costly and, although it may be individually rational, from a larger societal perspective it serves only to waste the cooperative surplus. Thus, the purpose of promoting industrial peace finds direct translation into the bargaining model as society's desire to minimize wasteful strategic behavior on the part of unions and employers.[127]

Morris, *How The National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. LAB. L. 1, 10 (2012).

122. *See* Klare, *supra* note 108, at 284 (quoting Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002 (1955)).

123. 79th Cong. Rec. 7571 (May 14, 1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2337 (1949) (statement of Sen. Wagner).

124. *See* Richard D. Kahlenberg & Moshe Z. Marvit, *Architects of Democracy: Labor Organizing as a Civil Right*, 9 STAN. J. C.R. & C.L. 213, 215–216 (2013) (describing the role of organized labor in national civil rights movements); Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 376, 400 (2007) ("Developed forms of worker organization also have important implications for democracy . . . ."); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 722 (1996) (describing the public benefits of workplace speech).

125. National Labor Relations Act § 1, 29 U.S.C. § 151.

126. 78 Cong. Rec. 3678 (March 5, 1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 20 (1949) (statement of Sen. Wagner). *See also* Klare, *supra* note 108, at 282 (noting that collective bargaining was thought to create the "mediating" and "therapeutic" conditions necessary for industrial peace).

127. *See* Dau-Schmidt, *supra* note 28, at 492.

This view underscores tensions between the unbridled strikes and work disruptions that preceded the Act, which interfered with production and economic revival, and the Act's objective to empower workers. Nevertheless, it fails to distinguish the drafters' intention to channel workplace conflict in the long term, after organizing, and its protections for generative conflict while mobilizing in the short term.

Missing from most contemporary discussions around the NLRA's objectives, therefore, is an explicit link between workers' empowerment through strife and collective action.[128] Workers would ideally bargain for, among other things, a system of grievance arbitration to resolve disputes peacefully if they did arise.[129] As Mark Barenberg explains below:

> Wagner's ideology was more nuanced than a simple labor-pacification position. He believed that the NLRA . . . would not simply palliate worker discontent but would, in his words, 'galvanize' and 'inspire' workers' collective rebellion by reinforcing their sense of entitlement, even while channeling that rebellion into goals and institutional structures concordant with the progressives' ultimate vision of labor-management cooperation.[130]

Under the NLRA's original vision of collective action, workers would benefit from a sense of freedom, equality, and purchasing power, reducing the need for

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128. The NLRA's drafters viewed state intervention into private sector labor relations as essential to structure and channel "conflict into manageable forms, thereby dampening larger scale, more destabilizing threats to industrial peace." *See* Casebeer, *supra* note 116, at 286–92; GOLDFIELD, *supra* note 95, at 184 (arguing that the drafters sought to eliminate "certain recognized causes of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes"); 78th Cong. Rec. 3433 (March 1, 1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 18 (1949) (statement of Sen. Wagner) (describing the principle intention of the then draft NLRA to "encourage the amicable settlement of disputes between employers and employees"). As Casebeer argues, the Act's regulations "were mainly aimed at setting the bargaining process in motion by eliminating these strikes, which were responsible for the most intense and bitter labor strife during the early stages of the Depression." *See* Casebeer, *supra* note 116, at 291–92. Estlund explains:

> The New Deal labor scheme was supposed to take most labor disputes and struggles for improved working conditions out of the courts and legislatures and into a reconstructed domain of contractually based self-governance, in which workers were citizens, with rights of association and freedom of expression, and the workplace was a site of self-determination.

Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 326 (2005).

129. The drafters rejected a system of compulsory arbitration, which they had seen in Europe and dismissed for enjoying "only questionable success," in favor of a voluntary system of dispute resolution that had proven effective in the railway industry. *See* 79 Cong. Rec. 7565 (May 15, 1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2341 (1949) (statement of Sen. Wagner). Wagner also recognized that "we cannot by statute make arbitration of all labor disputes mandatory, for compulsory arbitration, if it is to be effective, must carry with it compulsory obedience, and that destroys the right to strike." 78 Cong. Rec. 10351 (June 4, 1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1117 (1949).

130. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1441 (1993).

strife and channeling workplace conflict into the peaceful resolution of disputes through contractual and institutional arrangements. Unions and employers would be more likely to declare a détente (decide not to strike or lockout) and thus refrain from engaging in "wasteful strategic behavior"[131] if the armory on both sides of the labor-capital bargaining table were equally protected.

4. Economic Growth and Stability

The NLRA's drafters bore an enormous responsibility to craft a legal infrastructure capable of aiding the reconstruction of the 1930s failed economy. During drafting, Wagner cautioned that unequal bargaining between employers and combinations of employees was "fraught with great danger" and promised that equality was not only a moral issue but "the central need of the economic world today."[132] The lack of coordination between production and wages contributed to an asymmetrical income distribution "[in]sufficient to absorb industrial output."[133] Drawing heavily from Keynesian theories[134] of efficiency, productivity, and consumption power,[135] the Senator promised the Act would achieve "mass consumption" through higher employee purchasing power.[136]

The Keynesian model further supported the collective bargaining framework, albeit one regulated by the administrative state.[137] So authorized, the state could equalize bargaining power[138] by protecting employees' "free choice"[139] in the hopes that organized groups of workers could secure higher wages and, correspondingly, "expanded mass consumption."[140] Of course, questions remain as to whether channeling worker power into collective bargaining best serves their interests or whether it can even achieve peace under the current legal paradigm.[141]

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131. *See* Dau-Schmidt, *supra* note 28, at 492.

132. 78 Cong. Rec. 3433 (March 1, 1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 15 (1949) (statement of Sen. Wagner).

133. *Id.* at 19.

134. The drafters thus sought to redress the "[i]nequality of bargaining power [that] skewed supply and demand to the detriment of the legitimate public policy interest in economic recovery for all." *See* Casebeer, *supra* note 116, at 290.

135. *See* Getman, *supra* note 25, at 135 ("Collective bargaining, it was believed, would increase the wealth of employees, thereby stimulating the economy and reducing the likelihood of depression and recession.").

136. *See* Casebeer, *supra* note 116, at 308.

137. *See* CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960, 146–47 (1985) (describing how the passage of the NLRA "reconstituted collective bargaining, bringing this hitherto private activity fully within the regulatory ambit of the administrative state").

138. *See* Klare, *supra* note 108, at 282.

139. *Id.* at 283. Klare enumerates "free choice" and "bargaining power" as separate NLRA objectives. This Article conflates those objectives under a common economic recovery ambition given the legislative discussions that centered on how the former are means towards achieving the latter.

140. *See* Casebeer, *supra* note 116, at 308.

141. *See* Reddy, *supra* note 23, at 1396 (arguing that dominant Keynesian ideals contributed to a legal framework in which sound industrial policy was essential to economic recovery and industrial peace, converting labor law into "an act of interest convergence, not just radicalism").

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With the bloodiest forms of organizational activities behind them, judges and the NLRB focused on workers' organizing efforts to exert economic pressure on their employers. By the mid-1940s, however, the right of workers to associate was "subordinated in federal policy to the achievement of stability and industrial peace."[142] International developments during the Cold War and domestic-facing concerns about communism shifted popular perceptions around workplace solidarity and the role of unions.[143] A Republican-majority Congress retook the reigns of statutory labor protections. The 1947 Taft Hartley amendments (and the 1959 Landrum Griffin Act) took advantage of popular opinion against organized labor to drastically reduce union power.[144] They did so by prohibiting secondary activity[145] and "all manner of conduct, including not only sit-down strikes but mass picketing and picket-line violence more broadly."[146] The Taft-Hartley amendments keep worker solidarity controlled and confined.[147]

Like the Wagner Act, the Taft-Hartley text is silent concerning the nonunion workplace and the relationship between strife and peace. While labor law scholarship often (and rightly) blames those amendments for stifling worker protest and union organizing, the effects of the Taft-Hartley amendments on nonunion workers are not necessarily intuitive.[148] Nevertheless, by restricting unions from adding their power

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142. NLRB v. Hearst Publ'ns., 322 U.S. 111, 125 (1944) (arguing that the NLRA's drafters "sought to find a broad solution, one that would bring industrial peace by substituting . . . the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established"); TOMLINS, *supra* note 137, at 247.

143. *See* ROSEMARY FEURER, RADICAL UNIONISM IN THE MIDWEST, 1900-1950, 206–207 (2006) (describing the events that led up to the Taft-Hartley amendments).

144. *See* Levin & Puckett, *supra* note 7, at 5.

145. *See* 29 U.S.C. § 158(b). Secondary activity is "a combination to influence A by exerting some sort of economic or social pressure against persons who deal with A." *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 43 (1930) (internal footnotes omitted).

146. *See* White, *supra* note 36, at 60. Much has been written and debated concerning the relationship between the Wagner Act and the Taft-Hartley amendments. Rather than revisiting that scholarship, I will sum it up with the following description:

> The Wagner Act declared employers' militant refusal to recognize unions as the major cause of industrial unrest, and the abuse of employer economic power as the major obstacle to improved labor standards. Taft-Hartley saw union militancy as the cause of industrial unrest, and union coercive tactics as socially damaging rent seeking that distorted the labor market and threatened capitalist economic growth. The NLRA, the odd marriage between the two, left it to the NLRB to enforce these inconsistent mandates.

See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform Thirty-Ninth Annual Administrative Law Issue Administrative Law under the George W. Bush Administration: Looking Back and Looking Forward*, 58 DUKE L. J. 2013, 2035–36 (2008).

147. *See* VANESSA TAIT, POOR WORKERS' UNIONS: REBUILDING LABOR FROM BELOW 6 (2016) (explaining that, after the Taft-Hartley amendments in the 1950s, labor organizing "usually consisted simply of signing up more members and establishing new locals on the same model, with little concern for developing an activist base to influence broader social and economic change").

148. *See* Jennifer Gordon, *A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 278

and resources to strengthen secondary protests and strikes, the NLRA, as amended, places the onus on nonunion workers to garner organizing momentum and resistance without union assistance. Labor doctrine plays a crucial role in workers' decisions to risk their jobs by challenging dominant employers on their own.

III. THE FOUR PHASES OF STRIFE AND PEACE DOCTRINE

Much has been written about the failed state of U.S. labor law in protecting worker power.[149] This Part contributes to that conversation by explaining how the courts and NLRBs have lost sight of the NLRA's original intention to protect workplace strife. At the risk of oversimplification, it divides nearly a century of cases examining labor strife and peace into four phases, accepting that space does not permit an exhaustive treatment of the nuances and shifts within phases. For instance, as discussed later, the Obama administration used the prevailing labor standards within phase two to augment protections for nonunion workers engaged in strife without reversing precedent. Thus, each phase's standards are sufficiently opaque to permit significant variation across administrations.

Even acknowledging that variation, however, those phases illustrate how NLRBs and judges replaced presumptions of behavior and intent favoring workplace protest with presumptions favoring industrial peace. The earliest labor cases, in phase one, recognized that nonunion workers needed sufficient protection to generate solidarity while engaging in short-term antagonism. Those cases used the law to embolden worker challenges.[150] Unfortunately, three phases of cases quickly followed:

(Austin Sarat & Stuart A. Scheingold eds., 2006) (comparing the Taft-Hartley amendments immediate effects on "the range of economic weapons legally available to workers and unions" to the NLRA's long arc to workplace movements, which was a "slow process of co-optation, restriction, and decline").

149. Crain & Matheny, *supra* note 99, at 574 (discussing how the Act's "potential for redistributing power was never realized" in large part because of the "Court's enduring distrust of worker activism" and the effects of that activism on the "propertied class"); Dianne Avery, *Federal Labor Rights and Access to Private Property: The NLRB and the Right to Exclude*, 11 INDUS. REL. L.J. 145, 148 (1989); Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960's and 1970's and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB & EMP. L. 1, 2 n.3 (2005) (canvassing the labor law literature considering how the NLRA and NLRB "are massive impediments to unionization"); THEODORE R. ISERMAN, INDUSTRIAL PEACE AND THE WAGNER ACT 3 (1947) (assessing the NLRA's objective to lessen industrial strife eleven years after the Act's passage and concluding that "it has been a failure"); Kahlenberg & Marvit, *supra* note 124, at 216–222; Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1594–1596 (2016); ELLEN DANNIN, TAKING BACK THE WORKERS' LAW 5 (2006) (attributing the failed state of labor law to judicial intervention).

150. *See, e.g.*, Bettcher Mfg. Corp., 76 N.L.R.B. 526, 527 (1948); Thor Power Tool, 148 N.L.R.B. 1379, 1380 (1964), enforced, 351 F.2nd 584 (7th Cir. 1965) (employee's statement that his employer was a "horse's ass" was protected because it was *res gestate* of a contentious grievance meeting); Crown Cent. Petroleum Corp. v. NLRB., 430 F.2d. 724, 731 (1970) ("It has been repeatedly observed that passions run high in labor disputes and that epithets and accusations are commonplace. Grievance meetings arising out of disputes between employer and employee are not calculated to create an aura of total peace and tranquility where compliments are lavishly exchanged."); Lauren P. McDermott, *Unprotected Profanity: The Erosion of an Employee's Right to Convey Grievances*, 4 AM. U. LAB. EMP. L.F. 1, 10–11 (2014) (discussing the thirty years of caselaw protecting employee's "questionable conduct" so long as it "took place in the context of concerted activity related to collective bargaining").

In phase two, various NLRBs and judges incrementally rolled back protections for nonunion worker protests;[151] in phase three, the Trump Board rolled those protections back further;[152] and in phase four, the Biden Board reverted to phase two,[153] thus missing the opportunity to reinstate phase one's robust protections.

Why did the NLRB and federal courts change their positions on strife and peace? The NLRB and federal judges initially interpreted the NLRA in solidarity with nonunion workers. Those workers enjoyed the benefit of the doubt when they became emotional and disruptive. For instance, federal judges and the NLRB created a presumption that when a worker, acting alone in a nonunion workplace, protests a labor condition, she speaks for the group and thus engages in "concerted activity" for "mutual aid or protection."[154] They did not demand evidence that the protesting workers' fellow rank-and-filers were aware of or supported that protest.[155] Furthermore, the concept of peace was relatively narrow and tended to focus on the economic implications of various labor arsenals, such as strike and picketing actions. The issue at hand thus centered on whether the workers' economic warfare was protected under the circumstances.

This Article makes no empirical or direct causal claims as to what, exactly, changed in the eyes of the Board and courts. Instead, it offers three nonexclusive and nonexhaustive theories. Those theories support the claim that labor's industrial peace objective has broadened while its protections for strife have all but disappeared—to the detriment of workplace mobilization, solidarity, and peaceful bargaining.

First, U.S. work shifted from the manufacturing sector to the service sector in the 1970s.[156] In the former, the continuity of services—and not whether they were delivered with a smile—established reputation and competition. That might explain why the courts and Boards evaluated peace through an economic prism. In the latter sector, customer experiences on the premises make or break businesses, perhaps explaining why civility and other conduct rules have come to the fore.

Second, the September 11, 2001, terrorist attacks changed how U.S. companies conduct business. Some companies now justify restrictive workplace

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151. These cases are discussed in greater detail, Part II.A–B, *infra*. *See, e.g.*, Meyers Indus., Inc., 268 N.L.R.B. 493 (1984); Atlantic Steel, 245 N.L.R.B. 814 (1979).

152. These cases are discussed in greater detail, *infra* Part II.A–B. *See, e.g.*, Alstate Maint., LLC, 367 N.L.R.B. No. 68 (Jan. 11, 2019) (*overruling* WorldMark by Wyndham, 356 N.L.R.B. 765 (2011)); Gen. Motors, LLC, 369 N.L.R.B. No. 127 (2020).

153. These cases are discussed in greater detail, *infra* Part II.A–B. *See, e.g.*, Miller Plastic Prods., 372 N.L.R.B. No. 134 (2023); Lion Elastomers, LLC, 372 N.L.R.B. No. 83, at *3 (2023).

154. *See* Matthew W. Finkin, *Labor Law by Boz—A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 IOWA L. REV. 155, 160 (describing labor doctrine before *Meyers I* and *Meyers II*); *Meyers I*, 268 N.L.R.B. at 503 (Mem. Zimmerman, dissenting).

155. *Alleluia Cushion Co.*, 221 N.L.R.B at 1000.

156. *See* David A. Collier, *The Service Sector Revolution: The Automation of Services*, 16 LONG RANGE PLAN. 10, 10 (1983) (describing the shift from industrial jobs to service sector jobs as from 1980); TAIT, *supra* note 147, at 7 ("In the wave of plant shutdowns that began in the '70s, one of every three US manufacturing jobs disappeared, cutting out the heart of unions' traditional base."). I appreciate Cindy Estlund for drawing this shift to my attention.

rules and discipline by citing national security concerns.[157] Reference to peace at the workplace, particularly as the *Boeing* and *IBM* cases, below, illustrate, has become synonymous with workplace protections against terrorism.

Third, cases under Title VII of the Civil Rights Act place the onus on employers to establish non-discriminatory workplaces free from harassment or face penalties. That litigation introduces (real and pretextual) tensions between NLRA Section 7 protections and Title VII liability.[158] Under this theory, NLRA protections for abusive workers force employers to accept employee misconduct that could lead to a workplace climate of racial or sexual harassment—such as when coworkers bear witness to racial and sexual epithets directed at managers.[159]

Perhaps owing to those developments, some scholars suggest that labor law has not gone far *enough* to protect the sanctity of the workplace from disruptive and disobedient workers.[160] They argue that management has legitimate interests in protecting itself and its shops from racist, sexist, and otherwise hostile behavior that could harm workers and supervisors.[161] More recent scholarship sympathizes with the Trump Board's decisions making it easier for employers to discipline loud and offensive workers.[162] In contrast, others argue that judges and the Board have gone too far by allowing employers to fire workers for engaging in valuable, if antagonistic, expression

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157. *See infra* Part III.B.

158. For a discussion of employer liability and possible tensions in speech protections, see J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 1, 3–13 (1999).

159. *Compare* Molly Gibbons, *License to Offend: How the NLRA Shields Perpetrators of Discrimination in the Workplace*, 95 WASH. L. REV., 1495 ("The conflict between the NLRB's precedent and federal laws places employers in difficult situations where their obligations under the NLRA may put them at risk of civil liability under federal antidiscrimination laws."), *with* L. Camille Hebert, *Is Title VII a "Civility Code" Only for Union Activities?*, 45 U. ARK. LITTLE ROCK L. REV. 1, 34–35 (2022) ("Using the anti-discrimination laws to justify depriving employees of protection for union and concerted activities because those activities include sexist conduct or speech seems disingenuous when those laws actually do not protect employees from much of that workplace conduct or speech.").

160. Tyler Gnatkowski, *Employee (Dis)Loyalty: The Furtherance of a Common Enterprise*, 65 WAYNE L. REV. 145, 165–69 (2019) (proposing the Board adopt an objective standard that would render employee expression and conducted unprotected when reasonably calculated to harm the employer's reputation and income); Ryan H. Vann & Melissa A. Logan, *The Tension Between the NLRA, the EEOC, and Other Federal and State Employment Laws: The Management Perspective*, 33 ABA J. LAB. EMP. L. 291, 292–293 (2018) (arguing that Board decisions finding employee misconduct protected under the NLRA "run contrary to the EEOC's and Title VII's goals of eliminating workplace harassment and discrimination"); Estlund, *supra* note 124, at 733–735 (while advocating for expansive protections for workplace expression, arguing "[t]he workplace can thus perform its function within the system of freedom of expression only if it is subject to some constraints of equality, civility, tolerance, and respect that help foster reasoned deliberation"); Kurt Stumpo, *Driving the National Labor Relations Act Foreword: Analyzing Abusive Conduct That Occurs in the Course of Protected Activity After* General Motors LLC, 43 CARDOZO L. REV. 1999, 2003–2004 (2022) (arguing that the Board must adopt a workplace standard capable of eradicating racist and sexist behavior).

161. *See, e.g.*, Estlund, *supra* note 124, at 733–35.

162. *See, e.g.*, Casey Thibodeaux, *It's What You Said and How You Said It: The NLRB's Attempt to Separate Employee Misconduct from Protected Activity in General Motors LLC*, 82 LA. L. REV. 227, 253 (2021) (arguing that the Board's recent *General Motors* decision, discussed *infra*, "took a positive step by refusing to continue to protect egregious racially or sexually offensive conduct . . ." while noting that the Board should have defined "abusive conduct").

and conduct.[163] Those strands of labor scholarship seem to coalesce under their shared assumption that worker antagonism and industrial peace are discordant, or at least that workplace conflict is not essential for peace.[164] Their views misunderstand the necessary role of strife in solidarity and the peace that solidarity accords.

A. Phase One: Robust Protections for Nonunion Workers

In 1948, in *NLRB v. Phoenix Mutual Life Insurance Co.*,[165] the Seventh Circuit opened the door for nonunion workers to enjoy the Act's protections. Recognizing that the NLRA did not expressly describe the nonunion workplace, the court nevertheless acknowledged that a "proper construction" of the NLRA's intent was to protect the rights of workers to engage in concerted activities "even though no union activity be involved, or collective bargaining be contemplated."[166] For the first four decades following the NLRA's enactment, federal judges and NLRBs offered nonunion workers leniency, understanding that nonunion workers lacked the guidance and strategy that union members enjoy.[167]

In the well-known 1962 *Washington Aluminum*[168] decision, the Supreme Court acknowledged that workers at nonunion facilities should not be expected to know when and how to express their specific demands. That case dealt with seven nonunion workers who walked off the job owing to extremely cold factory conditions after having complained to, and been ignored by, the company.[169] The Court of Appeals had held in favor of the company's discharges, given that the protesting workers had not allowed the company to grant concession to their demands.[170] Reversing that decision, the Supreme Court reasoned that nonunion workers "had to speak for themselves as best they could."[171] Requiring those workers to follow specific grievance procedures would place "burdens on employees so great that it would effectively nullify the right to engage in concerted activities."[172]

Although judges generally followed the Supreme Court's approach, cracks along the doctrine for nonunion worker dissent began to surface. An influential

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163. *See* Charlotte Garden, *Was It Something I Said? Legal Protections for Employee Speech*, ECON. POL. INST. 10–17 (May 5, 2022) (lamenting the various ways that federal courts and Board members restrict workplace protest despite its concerted nature); McDermott, *supra* note 150, at 21–22 (noting concern that cases increasingly leaving workplace protest unprotected undermine the NLRA's objectives).

164. While the scholarship does not address industrial peace quite so forcefully, the assumption that "peace" is often used to reduce protest power often underpins analyses of labor conduct and statutory protections. *See, e.g.*, James Gray Pope, *The First Amendment, The Thirteenth Amendment, and the Right to Organize in the Twenty-First Century Symposium*, 51 RUTGERS L. REV. 941, 958–959 (1998) (describing the "limiting term" of peaceful assembly).

165. 167 F.2d 983 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948).

166. *Id.* at 988.

167. TAIT, *supra* note 147, at 7 ("After 1980 [sic] the National Labor Relations Board's will to protect workers' and unions' rights evaporated . . . .").

168. NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

169. *Id.* at 10.

170. *Id.* at 13–14.

171. *Id.* at 14.

172. *Id.*

1964 case in the Third Circuit, *Mushroom Transportation Co. v. NLRB*,[173] addressed the protest actions of Charles Keeler, "a nonregular employee" who worked as a driver in an otherwise unionized facility. Keeler was known for talking to other employees and advising them on their workplace rights.[174] The company president directed that Keeler's name be removed from the list of drivers to be hired when regular drivers were unavailable, effectively discharging him.[175]

The court began by noting that, unlike the union employees, Keeler was not a party to a union contract and thus could not benefit from the contract's job protections.[176] Despite the greater need for statutory protections, the court decided that Keeler's conversations with his fellow workers fell outside the NLRA. It distinguished statements intended to initiate group action from individual complaints, the latter of which it dismissed as "griping."[177]

Cracks notwithstanding, the protective scaffolding over nonunion workers' workplace dissent remained intact.[178] In 1975, in *Alleluia Cushion Co.*,[179] for instance, the Board held that when maintenance worker Jack Henley complained to the California OSHA about unsafe working conditions, his complaint "was an action taken in furtherance of guaranteeing Respondent's employees their rights under [the OSHA act]."[180] Although Henley acted alone, the Board crafted a per se presumption that the other workers shared concerns over the employer's statutory violations.[181]

While the Court and NLRB protected nonunion workers engaged in workplace protest, their caselaw suggested that workers' strife could not rage unabated. In the 1978 *Eastex, Inc. v. NLRB*[182] case, the Supreme Court addressed an organized workplace in which the workers sought to distribute a union newsletter in nonworking areas during nonworking time, urging employees to support the union.[183] The Court acknowledged that although workers enjoyed protections to engage in concerted activity for mutual aid or protection, "the forms such activity permissibly may take may well depend on the object of the activity."[184] At some point, the protest conduct could become too attenuated from matters within the

173. 330 F.2d 683 (3d Cir. 1964).

174. *Id.* at 684.

175. *Id.*

176. *Id.* at 685 ("In the present case there was a union contract by which the jobs of the regular employees were protected, and, as to them, the employer's right of discharge was limited by the terms of the contract, but Keeler was an extra man and, therefore, outside its protection.").

177. *Id.* (reasoning that if the only purpose of the protest is "to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere 'griping'").

178. *See* Morris, *supra* note 30, at 1696.

179. 221 N.L.R.B. 999 (1975).

180. *Id.* at 1000.

181. *Id.*

182. 437 U.S. 556 (1978).

183. *Id.* at 558.

184. *Id.* at 568 n.18.

employer's control, or the means of protection could not be justified by their ends. It reasoned: "The argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within 'mutual aid or protection' is unconvincing. The argument that *economic pressure* should be unprotected in such cases is more convincing."[185]

Phase one cases struck a measured balance between strife and peace. They emboldened workers to garner solidarity through workplace disruption yet ensured that workers could not engage in unreasonable demands outside the employer's control or through unsubstantiated economic pressure. Nevertheless, the Court and NLRB failed to articulate a clear theory for the nonunion workplace, leaving ambiguous whether and how disruption and strife were necessary antecedents of industrial peace. Their failure to seize the opportunity to craft a protective doctrine for generative workplace strife rendered those decisions vulnerable to modification through interpretation.

Unfortunately for workers, as described next, the Court and the NLRB soon dismantled protections afforded to nonunion workers seeking to divest the workplace of status quo employer domination. Through three subsequent phases of caselaw, those bodies ignored the NLRA's intentions to achieve peace through strife. They gave industrial peace an overly broad and outsized role in labor relations. Although the Biden Board tried to reinstate protections for workplace agitators, the robust leeway and grace once afforded to nonunion workers in phase one have disappeared, leaving those workers vulnerable and disincentivized.

B. Phases Two to Four: The Shrinking Role of Strife

This Section describes how labor doctrine is increasingly shrinking the role of strife in labor relations. The NLRB whittled away protections once afforded under *Washington Aluminum* and *Eastex,* first in the *Meyers* cases and, later, in *Alstate*. In the summer of 2023, as workers turned out to protest their workplaces in unprecedented numbers, the Biden Board reversed precedent to reinstate *Meyers*.

1. Phase Two: The Meyers *Cases*

In the 1964 *Mushroom Transportation* case, the court distinguished nonunion workers' individual complaints (unprotected griping) from concerted workplace complaints, thus somewhat narrowing the protections for protest conduct.[186]

185. *Id.* (emphasis added) (quoting Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1221 (1967)).

186. *See* Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964). *See also* Capitol Ornamental Concrete Specialties, Inc., 248 N.L.R.B. 851, 851 (1980) (finding employee discharged for personal "griping" was not protected under section 7). *But see* Whittaker Corp., 289 N.L.R.B. 933, 934 (1982) (holding that a single worker's remarks at a workplace meeting were concerted and protected because, among other things, the employee "phrased his remarks not as a personal complaint, but in terms of 'us' and 'we.'" The court concluded that the statements "implicitly elicited support from his fellow employees against the announced change."). *Id.*

Nevertheless, in the immediate aftermath, workers retained relatively robust protections to agitate and aggregate the workplace based on juridical lenience. Courts recognized that nonunion workers protest the workplace without a sophisticated understanding of labor law. Judges and Board members presupposed that coworkers supported workplace protests of "obvious mutual concern" without requiring evidence of their "outward manifestation[s] of support."[187]

In 1984, the Board dramatically reduced the space for workers to engage in protected strife. *Meyers I*[188] and *II*[189] dealt with the same set of facts: In a nonunion workplace, Kenneth Prill, a truck driver, refused to continue driving an interstate trip in a truck with faulty brakes and steering.[190] Despite his long tenure, the employer fired Prill because he had contacted a state public service commission for an official vehicle inspection.[191]

In *Meyers I*, the Board held that the employer did not violate the NLRA when it fired Prill because Prill acted alone.[192] To reach that conclusion, the Board overturned its longstanding constructive concerted activity doctrine (as expanded in *Alleluia*, discussed above) that employees enjoyed rank-and-file support when seeking to enforce statutory workplace rights.[193] "Instead of looking at the observable evidence of group action to see what men and women in the workplace in fact chose as an issue about which to take some action," the *Meyers I* majority complained, "it was the Board that determined the existence of an issue about which employees ought to have a group concern."[194]

In place of that presumption, first, the *Meyers I* Board held that a finding of concerted activity required the showing of objective evidence that the actions arose from group activity or "where individual employees seek to initiate or to induce or to prepare for group action."[195] Second, the majority objected to the burden of proof, which *Alleluia* placed on the employer to show that the conduct was *not* concerted.[196] It shifted the burden to the General Counsel to prove that other workers supported the protest conduct.[197]

On remand, in *Meyers II*, the appellate court invited the Board to reconsider its newly restrictive position on concerted activities.[198] Refusing to do so, the Board emphasized that "the Wagner Act [was] an effort to reduce the industrial unrest produced by the lack of appropriate channels for the collective efforts of employees

187. *See* Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975).
188. 268 N.L.R.B. 493 (1984).
189. 281 N.L.R.B. 882 (1986).
190. *Meyers I*, 268 N.L.R.B. at 497.
191. *Id.*
192. *Id.* at 498.
193. *Id.*
194. *Id.* at 495.
195. *See Meyers II*, 281 N.L.R.B. at 887.
196. *See Meyers I*, 268 N.L.R.B. at 495.
197. *Id.*
198. *Meyers II*, 281 N.L.R.B. at 882.

to improve workplace conditions."[199] It conceded that conduct involving "only a speaker and a listener" could be concerted.[200] However, examining the facts, it insisted that Prill was not acting "in the interest of the employees."[201] The Board cautioned that the question of protected protest action would, from that point onward, require "careful scrutiny of record evidence on a case-by-case basis."[202]

The *Meyers* cases significantly depart from the early labor protections afforded to nonunion workers engaged in generative protest. They leave unprotected workers whose divesting actions occur spontaneously, perhaps in immediate response to poor working conditions or lack of agency. They misunderstand how power on the shopfloor generates dynamically through perceptions of risk and solidarity as protests unfold. Recall that Richie's supporters joined in protest at different stages, well after other workers had begun walking off the job.

Unbeknownst to workers and their advocates, the case law would further diminish protections under the Trump administration. When the Biden Board reinstated the regressive *Meyers* doctrine in 2023, its decision came as a misguided blessing.

2. Phase Three: The Alstate Maintenance *Decision*

In 2019, in *Alstate Maintenance*, the Trump Board held that even the *Meyers* standards were too generous in protecting individual protest over workplace matters.[203] That case involved a skycap employee (those who assist airline passengers with their luggage outside the terminal) who provided services at JFK International Airport's Terminal One.[204] The skycap employees were not represented by a union. The majority of their compensation came from passengers' tips. The worker in question had protested in front of his supervisor and three fellow skycap employees that he did not want to assist with a soccer team's equipment because the team had refused to tip those services the year before.[205] The employee and the other three skycap employees walked away. In response, Terminal One's manager terminated the employment of all four employees, noting that the lead employee made disparaging comments about tips in front of the other skycap employees and terminal managers.[206]

The *Alstate* Board "easily" found that the employee's statements were not concerted activity and thus unprotected under the NLRA.[207] First, it noted that there was no evidence or contention that the employee was bringing a "truly group complaint" to the attention of management, in part because there was no evidence

199. *Id.* at 883.
200. *Id.* at 887.
201. *Id.*
202. *Id.*
203. *See* Alstate Maint., LLC, 367 N.L.R.B. No. 68 (Jan. 11, 2019) (*overruling* WorldMark by Wyndham, 356 N.L.R.B. 765 (2011)).
204. *Id.* at 1.
205. *Id.* at 2.
206. *Id.*
207. *Id.* at 4.

that the workers had discussed the soccer players' tipping practices before making the statement.[208] The employee's direct reference to "we," the Board held, did not save the scope of the comment because it merely showed "that the skycaps had worked as a group and had been 'stiffed' as a group, not that they had discussed the incident among themselves."[209]

Furthermore, the Board latched onto the employee's testimony that he considered his disparaging remarks "just a comment."[210] To the majority, that testimony proved that the worker was not looking "forward" to group action and was consequently "more than likely mere 'griping.'"[211] The Board failed to consider that the employee's comment could have shown fellow shop floor employees that it was okay to challenge unfair work assignments. It also overlooked that the object of the employee's grievance—the team's failure to tip—affected the wages of the skycap group.

In making these findings, the Board overruled the prior presumption that "an employee who protests publicly in a group meeting" was "engaged in initiating group action."[212] It also overruled the precedent that employees who complain in a group setting are engaged in concerted activity, arguing that such a presumption overlooks the "*many* complaints . . . voiced by individual employees in a group setting . . . 'by and behalf of the employee himself [or herself].'"[213]

3. Phase Four: The Miller Plastics *Decision*

On August 25, 2023, in *Miller Plastic Products*,[214] the Board reversed *Alstate Maintenance* and reinstated *Meyers*, the phase two doctrine. *Miller Plastics* dealt with a non-unionized plastics storage plant declared an essential business for COVID-19 pandemic closing purposes.[215] One of the workers, Ronald Vincer, expressed significant concern about the plant's health and safety policy. Immediately after, the company fired Vincer, citing poor performance.[216]

On appeal, the Board reversed the "unduly restrictive test" established in *Alstate Maintenance* and reaffirmed prior Board doctrine that individual worker complaints are concerted even if it is "the lone employee who complains to management in a less organized group context."[217] In place of the *Alstate* factors, the Board agreed with the proposition that "a lack of prior planning does not foreclose a finding of concerted activity, where the individual's statements further a common interest or by their terms seek to induce group action in the common

208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 6 (quoting *WorldMark*, 356 N.L.R.B. at 766).
213. *Id.* at 7.
214. 372 N.L.R.B. No. 134 (2023).
215. *Id.* at *2.
216. *Id.*
217. *Id.* at *5 (quoting MCPC, Inc. v. NLRB, 813 F.3d 475, 484 (3d Cir. 2016).

interest."[218] Instead, it held that a would-be organizer's protest is deemed concerted and therefore protected as long as it "*appear[s]* at the very least [to be] . . . engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees."[219] Ultimately, the majority reaffirmed "the fundamental principle of *Meyers II* that 'the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence.'"[220] The Board applied its standard to conclude that the worker's protests were concerted and thus protected under the Act.[221]

C. Phases Two to Four: The Growing Role of Peace

This Section explains how the current labor doctrine further undermines workers' generative activities by granting industrial peace an outsized role in determining whether nonunion protest is protected under the NLRA. Even under the Biden Board, when nonunion workers calculate the risk of their protest actions, they must worry about whether their strife is appropriately safeguarded *and* whether an overarching industrial peace objective will nevertheless eclipse it.

Many of the cases discussed below involve unionized workplaces. The prevalence of those cases relative to the cases involving nonunion workplaces is unsurprising—individual workers fired for antagonizing the workplace are less likely to dispute their treatment before the NLRB than those who benefit from union support and direction. Furthermore, without the benefit of union assistance, nonunion workers often lack the time and resources to engage in lengthy appeals while desperately searching for a new source of income.

Nevertheless, none of the below cases distinguish between unionized and nonunionized workplaces. The rules espoused are, consequently, applicable to both contexts. More important than the unionized/nonunionized distinction, consequently, is the broader trend that labor law, as interpreted, often allows employers to fire workers who are protesting their working conditions or opposing management. The NLRA consequently reinforces the "unstated proviso" that workers hoping to resist elite workplace narratives must keep "in line."[222] The concept of industrial peace—once confined in principle to the relationship between workers and employers—now encompasses a "societal interest in the smooth operation of the industrial system."[223] The resulting legal consciousness centers on cooperation,[224]

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218. *Id.* (citing *MCPC, Inc.*, 813 F.3d at 484–85 (3d Cir. 2016)).
219. *Id.* (citing *Meyers II*, 281 N.L.R.B. at 887).
220. *Id.* at *7 (quoting *Meyers II*, 281 N.L.R.B. at 886).
221. *Id.*
222. *See* Klare, *supra* note 108, at 319.
223. *Id.* at 320.
224. *See* Barenberg, *supra* note 130, at 1384–85 (describing the post-NLRA "cooperative" workplace).

harmony, and "business unionism"[225] to the detriment of generative solidarity.[226]

1. Phases Two to Four: Emotional Outbursts

From the NLRA's inception to the late 1970s, the Board and courts generally acknowledged that workers become emotional when engaged in workplace protest and protected strife accordingly.[227] In 1979, the Board dismantled many of those protections in *Atlantic Steel*.[228] There, an employee called the foreman a "lying son of a bitch" for claiming to have offered a probationary employee overtime only after asking more senior employees.[229] The foreman overheard the accusation and fired the employee.[230] The Board reversed the administrative law judge's finding that the employee's statement was carried out as *res gestae* of his grievance and was protected.[231] Instead of protecting the employee's outbursts as it would have previously, the Board reversed the judge and excepted "statements which are so opprobrious as to make the employee unfit for further service."[232] It then established a four-factor test to discern protected grievance conduct from "opprobrious" conduct.[233]

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225. Aaron Brenner, *Preface*, *in* REBEL RANK AND FILE: LABOR MILITANCY AND REVOLT FROM BELOW DURING THE LONG 1970S, xvi (Aaron Brenner, Robert Brenner, & Cal Winslow eds., 2010) (describing acquiescence to "business unionism" as a "debilitating weakness" of post-1970s rank-and-file rebellions); Getman, *supra* note 25, at 129–30 ("The vague, contradictory, and complex language of the statute has permitted the Board to express its policy decisions through a myriad of technical doctrines and subdoctrines that have increased the complexity of the law, even as they have limited and reduced the rights of workers."); KELLY, *supra* note 52, at 14–15 (explaining how organized labor now seek to "behave 'moderately' and . . . offer concessions to the employer as part of a new social partnership between" workers and employers); Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56, 67 (2019) (arguing that "labor's commitment to an ideology of business unionism (pursuing the bread-and-butter needs of its members through worksite-by-worksite representation) has resulted in a troubling and unsustainable divide between economic issues on the one hand, and discrimination and identity-related issues on the other, both in law and union praxis"); Reddy, *supra* note 23, at 1418 ("But, of course, they would be business unions. Constitutionally, their interests *were* the interests of business.").

226. Dan Clawson & Mary Ann Clawson, *What Has Happened to the US Labor Movement? Union Decline and Union Renewal*, 25 ANN. REV. SOCIO. 95, 99 (1999) ("The decline of organizing in the postwar era coincides with an increased focus on contract negotiation and the enforcement of work rules through the grievance system . . . ."); White, *supra* note 36, at 78 (arguing that subsequent judicial decisions and statutory amendments shaped "the character of the American labor movement on a more fundamental level, simply by discouraging militancy"); TAIT, *supra* note 147, at 6 (arguing that business unionism offered stable salaries and benefits to union members but "at the cost of grassroots democracy and militancy").

227. *See, e.g.*, Bettcher Mfg. Corp., 76 N.L.R.B. 526, 527 (1948) (cautioning that "[i]f an employer were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference," then either "collective bargaining would cease to be between equals (an employee having no parallel method of retaliation), or employees would hesitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives").

228. Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979).

229. *Id.* at 814.

230. *Id.*

231. *Id.* at 816.

232. *Id.* at 819.

233. *Id.* at 816 (balancing the following factors: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was,

The Board's phase one cases protecting workers' emotional or disruptive behavior were forever changed.[234] *Atlantic Steel* opened the door for various NLRBs to restrict protections for workers that failed to satisfy the various factors it invented. It also created an opportunity for further backsliding.

After decades of applying the *Atlantic Steel* test, the Board overruled it in phase three in the 2020 *General Motors* case[235] for not going far *enough* in removing worker protections.[236] It did so noting that the test's results—which sometimes still found that employers had violated the Act for disciplining employees' concerted opposition—"simply do not advance the Board's mission of promoting labor peace or any of the other principles animating the Act."[237]

In *General Motors*, employee and union committeeperson Charles Robinson told a manager to "shove it up [his] fuckin' ass" and purportedly engaged in other disruptive behavior.[238] The General Counsel issued a complaint alleging that the employer violated the NLRA when it disciplined Robinson while he was engaged in protected Section 7 activity on behalf of the union.[239] The Board disagreed. It reasoned that granting employees leeway when confronting management with workplace grievances "largely swallowed employers' concomitant right to maintain order, respect, and a workplace free from invidious discrimination."[240] The Board also relied on "[f]ederal, state, and local antidiscrimination laws" to find that the employer, in fact, had a "legal duty to protect employees" from "severe and pervasive harassment" at the workplace.[241]

On May 1, 2023, in phase four, the Biden Board overruled *General Motors* in *Lion Elastomers*.[242] It cited its previous cases acknowledging that "disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses"[243] and Supreme Court precedent validating that "[b]oth labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language."[244] It found that the *General Motors* Board decision had impermissibly invalidated those fundamental principles while granting "new power to employers to effectively determine, based on their own individual practices and preferences, the scope of

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in any way, provoked by an employer's unfair labor practice").

234. *See* McDermott, *supra* note 150, at 6 (arguing that thirty years of jurisprudence following *Atlantic Steel* mark an "increasing unwillingness to protect" employees' uncivil language).

235. 369 N.L.R.B. No. 127 (2020).

236. The Board overturned *Atlantic Steel* along with other cases examining whether "abusive conduct" was protected applying "setting-specific standards" looking at the totality of the circumstances. *Id.* at *4.

237. *Id.* at *8.

238. *Id.* at *2.

239. *Id.* at *12.

240. *Id.* at *31–32.

241. *Id.* at *6–7.

242. *See* Lion Elastomers, LLC, 372 N.L.R.B. No. 83, at *3 (2023).

243. *Id.* at *4.

244. *Id.* (citing Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 58 (1966)).

protected activity" under the NLRA.[245]

Rather than seize the opportunity to return to the NLRA's phase one cases, which had repeatedly recognized that passions run high in labor disputes and that epithets and accusations are commonplace,[246] the Board unimaginatively and unambitiously reverted to phase two by reinstating *Atlantic Steel*. It did so even though *Atlantic Steel*'s problematic four-factor test, itself, marked a departure from the previously robust protections for workers engaged in workplace conflict.

In reversing *General Motors*, the Biden Board also invited further confusion around permissible workplace strife. A longstanding question has centered on potential tensions between the NLRA's protections for workplace protest and Title VII's fundamental right to be free of harassment and abuse at the workplace. In dicta, the Biden Board opined that there were no such tensions.[247] The majority reasoned that "offhand comments and isolated incidents (unless extremely serious)" do not implicate employers' duty to protect against discrimination in the terms and conditions of employment.[248]

2. Phases Two to Four: Workplace Civility Rules

Just as the Act's peaceful objective gave cause and legitimacy to remove protections for opprobrious behavior, so too has it legitimated the use of management-made rules demanding that employees act with "civility" in the workplace. In 2004, in *Lutheran Heritage*,[249] the Bush Board ushered in phase two when it addressed a series of workplace rules that administered progressive discipline for failure to follow various "behavioral expectations," such as requirements to punch time cards.[250] The employer used those disciplinary procedures to fire Vivian Freman, an active union member who had stood up to management to protect other workers.[251] Holding that the employer lawfully fired Freman, the Board held that facially neutral civility rules could only violate the NLRA if, among other things, employees would reasonably construe the rule to prohibit Section 7 activity.[252] The employer's civility "rules prohibiting 'abusive and profane language,' 'harassment,' and 'verbal, mental and physical abuse' were lawful because they were intended to maintain order in the employer's workplace and did not explicitly or implicitly prohibit Section 7 activity."[253]

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245. *Id.* at *6.

246. *See* Fifth Circuit in Crown Central Petroleum Corporation v. NLRB, 430 F.2d. 724, 731 (1970) (synthesizing extant labor law and holding that, particularly in instances of worker grievances, "it would require severe conduct indeed to convince us that the interests of fair give and take between equal parties to bargaining could be justifiably submerged").

247. *See Lion Elastomers*, 372 N.L.R.B. at *8 n.45.

248. *Id.* at *8 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).

249. Martin Luther Mem'l Home, Inc. (*Lutheran Heritage*), 343 N.L.R.B. 646 (2004).

250. *Id.* at 653.

251. *Id.* at 653–54.

252. *Id.* at 646–47.

253. *Id.* at 646.

Dissenting Members Liebman and Walsh argued that they were "struck by the ambiguity of certain workplace rules—intended, perhaps, to achieve decorum and peace—that use words like 'abusive' and 'harassment.'"[254] They noted that the meaning of those terms was "highly subjective: as the Board has recognized, one person's abuse may be mere annoyance to another and no bother at all to a third."[255]

As the dissent prophesied, the Board's subsequent decisions applying *Lutheran Heritage* "produced mixed results."[256] While *Lutheran Heritage* marked the end of prohibitions on civility rules, it nevertheless offered enough interpretive space ("reasonably construe") for some worker-sympathetic Boards to find in favor of disciplined workers.[257] Consequently, as in the *Atlantic Steel* cases, a Republican-majority Board returned to the drawing board.

In 2017, in *Boeing Co.*,[258] the Trump Board overturned *Lutheran Heritage*'s "reasonably construe" standard in phase three.[259] The legal issue in *Boeing* had nothing to do with civility rules; instead, it asked whether the employer's facially neutral no-camera rule violated the Act.[260] Citing the Act's industrial peace objective,[261] the Board nevertheless argued that the *Lutheran Heritage* standard unfairly required employers to "eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of" protected activity, disregarding "the fact that generalized provisions related to employment—including those relating to discipline and discharge—have been deemed acceptable throughout the Act's history."[262] Given that employers could fire employees for any reason under the at-will employment doctrine,[263] civility rules would at least motivate employers to remain consistent and fair when doing so.[264]

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254. *Id.* at 649 (Liebman, M., and Walsh, M., dissenting in part).

255. *Id.*

256. *See* William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 43 (2006).

257. *See* Christine Neylon O'Brien, *Twenty-First Century Labor Law: Striking the Right Balance Between Workplace Civility Rule That Accommodate Equal Employment Opportunity Obligations and the Loss of Protection for Concerted Activities Under the National Labor Relations Act*, 12 WM. & MARY BUS. L. REV. 167, 189 (2020) ("In subsequent years, the Board's 'reasonably construe' standard expanded the scope of NLRA-protected activity and invalidated numerous work rules found in employee handbooks.").

258. 365 N.L.R.B. No. 154 (2017).

259. *Id.* at *1.

260. *Id.* at *1.

261. *Id.* at n.40.

262. *Id.* at *10.

263. The common law "employment at will" doctrine has been referred to as "the divine right of employers" that allows employers to fire workers without requiring just cause. *See* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000). The doctrine assumes that "the employee is only a supplier of labor who has no legal interest or stake in the enterprise other than the right to be paid for labor performed." *Id.* Cynthia Estlund observes that this doctrine permits employers to "effectively own the employees' jobs" by refusing to intervene. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1596 (2002).

264. *Boeing Co.*, 365 N.L.R.B. at *10.

In part, the Board's decision reflects the sensitive nature of Boeing's work and that its "facilities are targets for espionage by competitors, foreign governments, and supporters of international terrorism, and Boeing faces a realistic threat of terrorist attack."[265] The majority thus found that Boeing's workplace rule limited its right of "becoming a target" to violence.[266]

On August 2, 2023, in *Stericycle, Inc.*,[267] the Biden Board law flip-flopped again in phase four. As in *Boeing*, the Biden Board reversed the Trump Board's standard and revived phase two caselaw. It did so by reinstating the problematic standard enunciated in *Lutheran Heritage*.[268] Citing "the economic dependency of employees on their employers," the Board acknowledged that "employees are typically (and understandably) anxious to avoid discharge or discipline" and are consequently likely to interpret civility rules to prohibit their statutory right to "form, join or assist labor organizations."[269] Notwithstanding, the Board criticized the *Lutheran Heritage* standard for failing to "clearly address how employer interests factored into the Board's analysis."[270] Seemingly sympathetic to those interests, the Biden Board's new standard "makes explicit that an employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule."[271]

3. Phase Two Stagnation: Workplace Investigations

Workplace investigations differ from the types of workplace rules mentioned above. During investigations, workers are the targets, not the perpetrators, of challenge. Employers call them into closed-door meetings and allege employee misconduct and workplace violations. This Article reviews these cases, however, because workplace investigations are equally a site of power asymmetries and workplace fright. They are laden with the threat of discipline and discharge, all based on the employer's unilateral determination. The more invincible an employer appears, including by holding the reins to disciplinary charges and restricting worker solidarity during investigations, the less likely employees will risk their jobs to generate opposition.[272] Workers deprived of the right to ask for coworkers to be present are consequently atomized. How the law protects that right thus bares directly on workplace mobilization and power.

In the union context, and recognizing the significant power asymmetries embedded in disciplinary investigations, the Supreme Court has held that employees

265. *Id.* at *1.
266. *Id.* at *18.
267. 372 N.L.R.B. No. 113 (2023).
268. *Id.* at *1.
269. *Id.* at *2.
270. *Id.*
271. *Id.*
272. *See* Sachs, *supra* note 27, at 369–70.

may request the presence of a union representative,[273] a so-called "*Weingarten* right."[274] While that right is now well understood, an outstanding question concerns whether *nonunion* employees have a similarly protected right to request the presence of a coworker during disciplinary investigations. For over twenty years, various NLRBs have debated the question.[275] Pro-management NLRBs have generally held against rights protections, arguing that imposing *Weingarten* rights in all disciplinary interviews would disincentivize employers from conducting them.[276] Pro-employee NLRBs have pointed out that any contention of disincentives is merely speculative.[277]

In 2004, in *IBM Corp.*,[278] the Bush Board crafted the current doctrine that workers in nonunion workplaces are not afforded the *Weingarten* right (stagnant phase two). Despite the dissent's compelling arguments concerning the asymmetries in investigatory proceedings and employees' rational fears, the Board majority simply referred to "a rise in the need for investigatory interviews, both in response to new statutes governing the workplace and as a response to new security concerns raised by terrorist attacks on our country."[279] The majority feared that allowing coworkers to be present could compromise the confidentiality of the employer's investigation of sensitive matters like "theft, violence, sabotage, and embezzlement."[280] It also noted that "under today's statutory schemes, foregoing the employee interview leaves an employer open to charges that it did not conduct a fair and thorough investigation, which in turn exposes the employer to possible legal liability."[281]

The Biden Board has not reversed *IBM Corp.* Its *Cemex* decision[282] expressly declined to take up the matter. Currently, nonunion workers enjoy no statutory protections to demand solidarity and support during workplace interrogations. Looming is the Trump Board's opinion that nonunion employees' protest is

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273. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

274. *See, e.g.*, Plouffe v. Gambone, 2012 U.S. Dist. LEXIS 85405, at *19 (E.D. Penn. 2012) ("[T]he Weingarten right to have a union representative at an investigatory interview is a federal right under § 7 of the NLRA.").

275. *See* Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 747–49 (2005) (noting that the Board has changed approaches on these cases since 1985).

276. *See, e.g.*, E. I. Dupont & Co., 289 N.L.R.B. 627, 630 (1988), *review denied by* Slaughter v. NLRB, 876 F.2d 11 (3d Cir. 1989) (per curiam).

277. *See, e.g.*, Epilepsy Foundation of Ne. Ohio, 331 N.L.R.B. 676, 679 (2000), *aff'd in part and rev'd in part*, 268 F.3d 1095 (D.C. Cir. 2001).

278. 341 N.L.R.B. 1288 (2004).

279. *Id.* at 1291.

280. *Id.* at 1293.

281. *Id.* at 1294.

282. Cemex Const. Mat. Pac., LLC, 372 N.L.R.B. No. 130 (2023). In that case, which otherwise marks improvements in representation elections, the Board was tasked with affirming the administrative law judge's finding that the employer violated the NLRA by suspending a worker seeking advice from a union agent. *Id.* The employer raised *IBM* to defend its actions, asserting that the worker had no right to union representation during its disciplinary proceedings. In affirming the judge's finding, the Board merely found that "this situation did not involve the context-specific *Weingarten* right to bring representation to a disciplinary meeting" because the worker was seeking advice "during an active union campaign." *Id.* at 10 n.50. The Board did not explain how, exactly, the background union campaign affected *IBM*'s proposition that nonunion workers have no protected right *during disciplinary proceedings*.

secondary to the employer's legal responsibility to protect workplace peace.

D. Assessing Current Protections for Nonunion Workers

During the Summer of 2023, workers engaged in unprecedented strikes across the country, notwithstanding the inhospitable legal climate that permitted corporations to fire them. The Biden Board responded by taking what it considered to be corrective action to protect would-be organizers. As mentioned above, however, the Biden Board failed to revert to the robust protections for workplace strife witnessed in the NLRA's early years.

To summarize those cases, recall that the Biden Board's *Miller Plastic Products* merely returned to the *Meyers* cases, which had stripped away the benefit of the doubt workers enjoyed under *Alleluia* that coworkers support workplace protest. In *Lion Elastomers*, the Biden Board returned to *Atlantic Steel*'s four-factor test despite decades of prior precedent fully protecting emotional outbursts linked to collective protest. In *Stericycle*, the Biden Board returned to *Lutheran Heritage*'s reasonable construe test notwithstanding earlier NLRB cases prohibiting civility rules outright.

Worse still, some of the Biden Board's decisions arguably *weaken* workers' protections compared to the legal standards in phase two. First, *Stericycle* adopts *Lutheran Heritage* but now also allows employers to legitimize their otherwise discriminatory or coercive disciplinary action by evincing certain "business justifications."[283] What employer will lack for a "legitimate and substantial business interest" to remove antagonistic workers from the shop floor?[284]

Second, in *Lion Elastomers*, the Board majority blundered by dismissing statutory tensions between Title VII of the Civil Rights Act and Section 7 of the NLRA. It failed to consider that if the NLRB were to reassert worker power as proposed in *Lion Elastomers*, the role of *workers* as protector of the workplace might conflict with Title VII's entrenchment of the *employer* as the protector of the workplace. The Biden Board thus invited further confusion, potentially deterring workers from speaking up against workplace discrimination in instances in which management not only allows but perpetuates it.

For instance, studies suggest that employers do not always use workplace rules to protect the vulnerable; on the contrary, employers sometimes impose such rules

283. Stericycle, Inc., 372 N.L.R.B. No. 113 (2023) at *10.

284. Cases such as the Starbucks dismissals demonstrate how employers are skilled at using civility rules as a pretext to fire would-be organizers by advancing business concerns. *See, e.g.*, Kerwin v. Starbucks Corp., 2023 U.S. Dist. LEXIS 30590, at *1–2 (E. Dist. Mich. Feb. 23, 2023) (finding reasonable cause that Starbucks violated the NLRA by terminating a worker's employment due to her organizing activities); Jaffe, *supra* note 1 ("Shortly after the union campaign launched in the summer of 2021, managers began citing Rizzo for minor dress code infractions — [sic] small rips in the knees of her jeans, an unauthorized suicide awareness button on her apron — [sic] that she said were previously never an issue."); *Boeing Co.*, 365 N.L.R.B. No. 154, *28 (2017) (Member Pearce, dissenting) ("These cases confirm the tendency of employers to interpret overbroad and ambiguous civility rules to prohibit conduct that is clearly protected under the Act.").

to punish marginalized workers.[285] Consider that discipline and promotion decisions, often made by White male supervisors, reflect "that individuals automatically label others based on easily observable and accessible categories (e.g., race, age, or gender) leading to subjective preferences for in-group versus out-group members."[286] Civility rules reflective of workplace norms, including behavioral norms, are often imposed disparately against racialized minorities.[287] Black women, for instance, report feeling pressured to change their hair, speaking style, and behavioral patterns at work to avoid "the accusation of being angry and difficult . . . ," rendering them vulnerable to workplace discipline.[288]

In dismissing Title VII and Section 7 tensions, the Biden Board also failed to consider that the collective worker majority does not always share the same interests in protecting racialized minorities or women as might an employer fearful of litigation. In some instances, employers may be *more* protective of marginalized workers than the worker majority.[289] Finally, it failed to consider that rank-and-file workers may not always self-correct or might otherwise refuse to protect supervisors who, albeit members of management, still deserve to work at a workplace free of bigotry and harassment. Instead, the Board punted the responsibility of balancing labor and employment rights on the Equal Employment Opportunity Commission (EEOC), which it noted had failed to offer guidance.[290]

Third, although the Board's reversal of *Alstate* in *Miller Plastic Products* marks a welcomed improvement to worker protections (*Alstate* required a showing that the protesting employee had premeditated its protest action and garnered solidarity at the outset), its rationale and resulting standard will confuse workers, employers, and future judges. In reinstating *Meyers*, the Biden Board affirmed that workplace protest is concerted only if "the individual's statements further a common interest or by their terms seek to induce group action in the common interest."[291] The Board clarified that while it no longer requires evidence of prior *planning*, the General

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285. *See* Derek R. Avery et al., *Is Justice Colorblind? A Review of Workplace Racioethnic Differences Through the Lens of Organizational Justice*, 10 ANN. REV. ORG. PSYCH. ORGA. BEHAV. 389, 391 (2023) (examining the disparities in performance evaluations); Sheryl L. Walter et al., *The Race Discipline Gap: A Cautionary Note on Archival Measures of Behavioral Misconduct*, 166 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 166, 167 (2021).

286. *See* Walter et al., *supra* note 285, at 167–68.

287. *Id.* at 168 ("Black employees in a predominantly White organization may experience racial differences in their rates of behavioral misconduct because, when there is an allegation of misconduct, members of the organization may be more likely to rule against a Black employee and record it as an official conduct violation than they would for a White employee.").

288. *See* Danielle D. Dickens & Ernest L. Chavez, *Navigating the Workplace: The Costs and Benefits of Shifting Identities at Work among Early Career U.S. Black Women*, 78 SEX ROLES 760, 761 (2018).

289. The paradigmatic exclusive representation case, *Emporium Capwell*, exemplifies majority preferences. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975). In that case, the Black union members wanted to protest the employer's racist activities, but the White union members, some of whom benefitted, refused to participate. *Id.* The Supreme Court held that the Black members were bound to the position of the majority representatives. *Id.* at 65–67.

290. *See* Lion Elastomers, LLC, 372 N.L.R.B. No. 83 at *8 n.45 (2023).

291. *See* Miller Plastic Prods., 372 N.L.R.B. 134 at *7 (2023).

Counsel must be able to demonstrate common objectives between the protesting worker and the rank-and-file.[292] How can workers spontaneously protest if they must first preconceive their objectives?

The Board's *Miller Plastics* decision leaves no space for impulsive protests that begin as individual grievances but prove capable of affecting the workplace. Recall Fantasia's "culture of solidarity,"[293] which workers share only after divesting actions that shift perceptions of the status quo into a *we* versus *them* mentality.[294] Distinctions between individual protest and generative divesting actions capable of protecting the workplace are works of fiction. Were the workers furthering a common interest when they protested Richie's discharge or individually protesting the firing of their friend and long-term colleague? What about when a worker such as Prill refuses to drive an assigned truck with faulty brakes? Is he looking out only for himself or setting the precedent that workers should not be required to put their lives in jeopardy? The NLRA was designed to mobilize workers and coalesce their individual grievances and rights under a collective framework. The Biden Board, by contrast, interprets the NLRA to divide workers based on their protest.

The best defense of the current doctrine sanctioning some employee discipline of antagonistic workers is that doing so is necessary to protect the peace, however defined, and that achieving peace is an essential objective of the NLRA. The resulting decline in solidarity is justified by the adverse impact on other employees, supervisors and members of management, and economic productivity on the whole.

These rationales assume that nonunion workers who question the legitimacy of the employer-dominated status quo do so for individual gain to the disadvantage of the collective workforce and productivity. Underappreciated, however, is that restricting workplace antagonism merely postpones such disruption to the longer term, when atomized workers are pushed to extremes but lack formal dispute and grievance mechanisms. Those workers may resort to strike activity and resignations rather than resolve their grievances through predictable (and far more peaceful) bargaining.

Another defense of the Biden Board's labor doctrine is that it has reinvigorated the Obama administration's pro-worker interpretations of phase two legal standards. The Obama Board offered robust protections, even if it did so through legal strategy and not by reversing inhospitable legal standards outright.[295] Thus, the argument goes,

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292. *Id.*

293. *See* FANTASIA, *supra* note 76, at 17.

294. *See, e.g.*, TARROW, *supra* note 59, at 31.

295. For instance, the Obama Board applied the *Meyers* standard to advance protections for strife by deciding that an individual employee complaint was "concerted" and thus protected even though the complaining employee was unaware, when he made the complaint, of whether his complaint was shared among his coworkers. *See* Worldmark by Wyndham, 356 N.L.R.B. 765, 766–67 (2011) (finding that the employee's protest of a new workplace rule was concerted and was intended to induce group action merely because it was made in the presence of colleagues). The Obama Board also upheld protections for workers notwithstanding phase two's aggrandizement of industrial peace objectives. Applying *Atlantic Steel*, the Obama Board protected an employee's profane personal attacks on the company owner (Plaza Auto Ctr., Inc., 360 N.L.R.B. 972 (2014)); a union steward's reference to the

by returning to phase two, the Biden Board significantly strengthened protections for antagonistic workers, and we are now arguing about semantics.[296]

That argument is valid, particularly if one disagrees with the above argument that the Biden Board's cases weaken phase two by adding, for instance, new ways for employers to justify their employee discipline. However, the argument here is not that the Biden administration failed to act but that it missed the opportunity to go *further* by returning to phase one's per se presumptions of employees' good faith antagonism and employer-centric burdens of proof. Moreover, the Biden Board's treatment of cases dealing with civility rules, opprobrious conduct, and workplace investigations as isolated legal issues forewent the opportunity for it to advance a holistic framework capable of protecting a broad spectrum of antagonistic conduct under the Act. It settled for mediocre doctrine when it should have cast its sights on ambitious assurances capable of emboldening nervous nonunion workers.

Some might also argue that the Biden Board's decisions, even if imperfect, will not affect nonunion workers. Recall *Washington Aluminum*, which assumed that nonunion workers would be unfamiliar with labor law, let alone savvy to its constant ebbs and flows. If workers are unaware that their employer can, for instance, fire them while citing legitimate and substantial business interests, then their workplace strife and risk appetite will not necessarily be affected by *Stericycle*.

The above argument overlooks the labor mobilization typology described in Part I. Recall that workers' risk calculus is based mainly on what they witness on the shop floor.[297] Fantasia's account of Richie's reinstatement reminded us that solidarity begins in fits and starts based on the mobilization of otherwise nervous workers and potential emboldening through contestation. Conversely, workers who witness baristas like Lexi Rizzo or warehouse workers like Chris Smalls get fired for contestation will reasonably feel less inclined to follow suit.

This Article is, consequently, less concerned about the effect of flip-flopping Board doctrine on nonunion workers than it is about the effect on their *employers' disciplinary decisions*. Residual ambiguities such as those left by the Biden Board embolden employers to threaten or fire workers. They can rely on business justifications or gamble with case-by-case scrutiny.

Finally, employers, too, deserve to have clear directives on permissible workplace rules, expectations, and disciplinary action to manage the workplace. Not all employers have nefarious objectives—some are good actors intent on following

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supervisor as "an ass" (United States Postal Serv., 364 N.L.R.B. No. 62, 701 (2016)); and a white picketer's comment to black replacement workers: "Hey, did you bring enough KFC for everyone?" (Cooper Tire & Rubber Co., 363 N.L.R.B. 1952, 1954 (2016)). Applying *Lutheran Heritage*, the Obama Board majority invalidated a hospital workplace civility rule notwithstanding the dissent's argument that the hospital had legitimate reasons to protect patients from hearing disparaging comments regarding the capacities of the doctors and nurses. *See* William Beaumont Hosp., 363 N.L.R.B. 1543, 1549–50 (2014) (Bd. Member Miscimarra, dissenting).

296. The author thanks Michael Green for raising this argument.

297. *See* Andrias & Sachs, *supra* note 27, at 618.

the law. Doctrinal ambiguities may cause employers to refrain from disciplining or firing workers engaging in genuinely inappropriate or violent behavior. The next Part, therefore, seeks to craft an explicit theory of protections for workplace strife that distinguishes generative behavior that the law should protect from opprobrious and bigoted behavior that the law should not protect.

IV. A THEORY FOR LABOR STRIFE AND PEACE

How should the law motivate atomized, vulnerable workers to mobilize and combine their power? How can the law simultaneously ensure that no woman or man, employee or supervisor, is forced to tolerate abuse? This Part argues that the Board, courts, and Congress must advance a labor theory capable of crafting an enabling environment for workplace organizing (without stripping the workplace of necessary boundaries) to ensure greater industrial predictability and peace.

If drawing parameters around permissible strife were impossible, the NLRA's drafters would have created an inescapable paradox. Again, Section 7 enshrines workers' rights to amalgamate while resisting managerial power, and Section 13 protects their right to strike. On the other hand, its statement of purpose promises to mitigate strife in the name of industrial peace—all with an eye to granting workers greater agency and voice at the workplace. The drafters understood that such a paradox was a mere illusion. The Act protects strife as a necessary antecedent to solidarity—a feature of workplace democracy and long-term peace.

That understanding has been forgotten. The Court, NLRB, and federal judges confront the NLRA's illusory paradox by eliminating what they deduce as threats to industrial peace—a term they have broadly defined to encompass everything from a non-discriminatory working environment[298] to a friendly workplace protected against terrorism.[299] The Court and NLRB have all but ensured nonunion workers remain atomized and unprotected when opposing management. Current efforts to embolden workers fall short of expectations and potential.

Despite the scales tipped against them and reminiscent of the pre-NLRA era, rank-and-file workers are standing up to management to demand greater equality and voice at the workplace. And, like then, their protest is unpredictable and disruptive. Workers engaged in over 100 strikes during the summer of 2023, alone.[300]

Is the momentum sustainable, or is it a short-term reaction to labor shortages, a pro-worker administration, and media coverage? Most predictions of longstanding labor organizing appear grim.[301] Not because workers lack the energizing momentum or political platform but because scholars and policymakers recognize the inhospitable legal climate forestalling worker organizing. Some scholars blame

298. *Id.*

299. *See Boeing Co.*, 365 N.L.R.B. No. 154, at *1 (2017).

300. To access detailed metrics regarding strike action, including workplace stoppages from May 1 through July 31, 2023, see Labor Action Tracker, *supra* note 10.

301. *See, e.g.*, Reddy, *supra* note 23, at 1446 (lamenting that "rapidly increasing support for unions has not been accompanied by a meaningful increase in union membership rates").

the U.S. government and the NLRB.[302] Meanwhile, employers such as Starbucks continue to threaten and chill workers' protests to obstruct solidarity and worker power. Workers must either accept undemocratic working conditions that deprive them of agency and power or risk getting fired while engaging in unpredictable strikes and workplace disruptions. They shoulder the burden of current labor doctrine, along with consumers caught in the middle of supply chain disruptions[303] and broader society that stood to benefit from a climate of workplace democracy.

A. A Call to Return to Phase One

This Section argues that the ingredients for a labor theory capable of generating workplace solidarity are baked into the NLRA's design and early doctrine. The NLRA's phase one cases demonstrate that the law can draw sufficient lines to protect atomized workers while cautioning them against taking their workplace frustrations too far.

Mainstream labor scholarship seems to have given up on the NLRA's empowering potential.[304] That scholarship devotes significant time, energy, and resources to advance a new framework. Catherine Fisk and Deborah Malamud call for a revised labor law fit for its complex regulatory purpose.[305] Richard Kahlenberg and Moshe Marvit center efforts on revising the Civil Rights Act,[306] while others search for a new constitutional grounding.[307] This Article instead agrees with Kate Andrias, who argues that the solution to the demise of organizing centers less on inventing a new legal basis for labor law than it does on "an *acute remembering*" of the law's foundational principles.[308] Whether due to a lack of memory or political consensus on labor law, the time is ripe for remembering the role of strife in workplace organizing and engendering long-term peace.

Such a remembering would revive the early workplace strife cases. Those cases

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302. *See* Casebeer, *supra* note 116, at 286 ("The generality of the Act's protection of labor practices has allowed—perhaps contrary to legislative intent—conservative judicial and National Labor Relations Board constructions of the law, which ultimately have reduced the economic power of labor.").

303. *See, e.g.*, Robert Ovetz, *The Working Class Pandemic in the US*, *in* STRUGGLE IN A PANDEMIC: A COLLECTION OF CONTRIBUTIONS ON THE COVID-19 CRISIS 53, 59 (2020) (describing how workers' wildcat strikes in the United States affect global supply chains in the United States and abroad).

304. *See* Gordon, *supra* note 149, at 57 ("Unions, and the attorneys who represent them, have been strategizing to avoid the NLRA's sticky web, seeking out pockets of space in which organizing feels *possible* again, unconstrained by restrictive legal rules and the molasses-like pace of NLRB and judicial decision-making.").

305. *See* Fisk & Malamud, *supra* note 146, at 2077–83.

306. *See* Kahlenberg & Marvit, *supra* note 124, at 224.

307. *See* Crain, *supra* note 102, at 228–30 (proposing that workplace organizing should be considered a constitutional free assembly right); Crain & Matheny, *supra* note 99, at 564; Andrias, *supra* note 149, at 1596–1603.

308. *See* Andrias, *supra* note 149, at 1595. Ellen Dannin similarly argues that "a potential for reinvigorating the labor movement and saving the soul of this countries" rests within the NLRA's policies "not as a list of simple statements of purpose, but, rather, as mapping to values of industrial and social democracy." *See* Ellen Dannin, *At 70, Should the National Labor Relations Act Be Retired? NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. LAB. L. 223, 225 (2005).

were *functional*—they offered nonunion workers assurances that generative conflict would be protected while ensuring a pragmatic compromise with management. They protected protest and non-unionized facilities and granted nonunion employees leeway to stumble through workplace conflict. They critically viewed discipline that could "reasonably be said . . . to interfere with the free exercise of employee rights under the Act."[309]

Nevertheless, as described earlier, the Board continues to lack an appreciation for the co-constitutive roles of peace and strife. It had the opportunity to revert to the NLRA's phase one doctrine protecting nonunion workers but declined to do so. Its piecemeal approach lacks an organizing theory accommodating workers fearful of losing their jobs. Rather than continue to address each case in a vacuum, the NLRB must adopt a holistic labor theory to embolden workers engaging in generative workplace strife.

That labor theory must adopt the following principles. The first principle is that industrial peace is a long-term ambition begot by strife. The Board and courts must assess workplace misconduct by recognizing that workers need the confidence to disrupt the status quo, demand change, and combine their numbers. That recognition should guide their analysis and presumptions when reading about workplace disputes. This principle, as Diana Reddy suggests, will undoubtedly face challenges. In her efforts to refocus labor movements as broader social and political movements, Reddy concedes that "Americans (and particularly liberals) often romanticize worker power, but are troubled when it is wielded."[310] Particularly in times of high inflation rates and exorbitant public spending, public and juridical opinion of worker strife may be too impatient for gradual peace.

From this perspective, it is worth remembering that the workplace emotions that undergird strife do not disappear when controlled. As Wagner argued, workers so silenced will merely find other avenues of expression—none of which will advance peace or economic growth. Unmotivated workers may express protest by working slowly and less efficiently. They may abruptly resign. They will almost certainly *not* work harder in pursuit of managerial expectations.[311] The consequential, power-asymmetrical workforce looks nothing like the motivated and empowered workforce the New Dealers thought they were advancing.

The second principle is that labor doctrine must show grace towards nonunion workers. *Washington Aluminum* recognized that nonunion workers did not plan their

309. *See* Am. Freightways Co., 124 N.L.R.B. 146, 147 (1959).

310. *See* Reddy, *supra* note 23, at 1448.

311. According to a Gallup poll, at least fifty percent of the U.S. workforce reports "quiet quitting," in which they refrain from operating above the bare minimum at the workplace, and eighteen percent reported actively disengaging from their jobs. At the same time, since the latter half of 2021, job resignations have been on the rise. Workers reported that their productivity and resignations reflect, among other things, whether they felt cared about at work, whether they felt connected to the organization's mission, and whether their job expectations were clear. *See* Jim Harter, *Is Quiet Quitting Real?*, GALLUP (Sept. 06, 2022), https://www.celynarden.com/uploads/2/0/1/3/2013557/is_quiet_quitting_real_.pdf [https://perma.cc/G8YZ-E55T].

protest with a comprehension of labor cases. *Alleluia* assumed that rank-and-file workers supported agitators fighting for better workplace conditions. As union representation declines and unions are increasingly forced to choose which nascent

The third principle, enunciated in *Stericycle*, is that the Board's inquiry should center on the *effects* of employer actions on workers.[312] As the Board and prior courts have acknowledged, focusing on such effects "serves an important prophylactic function: It allows the Board to block rules that might chill the exercise of employees' rights by cowing the employees into inaction, rather than" waiting for a chilling effect to manifest.[313] However, unlike *Stericycle*, the NLRB and courts must drop the burden-shifting test that permits employers to override those effects with a showing of a "substantial and legitimate business interest." If the concern is workplace discipline's behavioral and psychological impact on workers, the employers' business justifications are irrelevant. Again, businesses will always have cause to keep workers complacent, particularly in a service economy increasingly nervous about the optics of worker protests.

The fourth principle is that nonunion workers must enjoy the same *Weingarten* rights entitling them to coworker solidarity during workplace investigations as do union workers. The Board and courts should do so on broad grounds that all workers must enjoy statutory protections to combine their numbers when squaring off against management.

The fifth principle, and one that may assuage some of the concerns above, is that employees may lose the protection of the Act when their protest conduct is attenuated from matters within the employer's control, creates a hostile workplace in line with Title VII jurisprudence, or violates conduct rules negotiated by workers and employers. Those limits are described next.

B. Limits to Protected Strife

Workplace strife is not always generative. The scales of justice should not always tip in favor of employees' rights to disrupt the workplace. For instance, violence at the workplace not only loses protections under the Act but it subjects perpetrators to criminal penalties. This Section addresses the harder cases in which misconduct is shy of violating criminal statutes but raises questions about the means and ends of worker protest. Any proposal suggesting that the means and ends of protest should be categorically protected would essentially authorize the federal government, through its administrative agency, to require companies to tolerate abuse or harassment at the workplace. It would subject women and men to racial and sexual epithets by disenchanted subordinates, undermining the fundamental rights of *those* workers—whether rank-and-file or supervisors—to protections against harassment and bullying.

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312. Stericycle, Inc., 372 N.L.R.B. No. 113, at *2–3 (2023) (recalling that "the Board regularly has assessed work rules to determine 'the reasonably foreseeable effects of the wording of the rule on the conduct of the employees'").

313. *Id.* at 3.

In that sense, the early cases addressing the NLRA's protections for strife again offer helpful guidance. Those cases recognize that not *all* workplace protest conduct is protected under Section 7. Below are a few parameters that should carry over to future Board doctrine to disentangle protected and unprotected workplace antagonism.

1. The Means and of Ends Protected Protest

The first parameter potentially subjecting protesting workers to discipline is that the means must be appropriate in light of the ends. Recall the *Eastex* case, discussed earlier, in which the Supreme Court noted that "even when concerted activity comes within the scope of the 'mutual aid or protection' clause, the forms such activity permissibly may take may well depend on the object of the activity."[314] The Court suggested that the employer's "lack of interest or control" does not affect whether the employees' protest was carried out for "mutual aid or protection."[315] However, it raised questions about whether the economic means of the employees' protest were protected given the ends.[316]

To illustrate the tensions between the means and ends of protest, consider the following two scenarios. In the first, a worker screams obscenities at his supervisor upon learning that the employer is imminently filing bankruptcy. In that instance, the employee's conduct may be carried out for mutual aid and protection (he may have been voicing concerns over the closure on behalf of the workforce) but targets a subject over which the employer has little control (bankruptcy). In the second, a worker requests a personal day off during peak production season. The employer denies it but clarifies that she can have the day off after peak season. The worker protests by walking off the job during the peak season, putting significant economic pressure on her employer. In both instances, the gravity of the protest action is measured against the ends, potentially rendering concerted activity for mutual aid and protection vulnerable to appropriate employer discipline.

This exception to protected activity nevertheless grants workers greater space to protest their workplace conditions than the Biden Board has offered. Namely, the employer—not the nonunion worker—should bear the burden of proving that its disciplinary action was appropriate in the above instances. That burden places employers on notice, at the outset, that workers' protections remain intact absent these unique circumstances. It also incentivizes employers to clarify rules of conduct and forms of discipline in contracts negotiated with workers—a feature discussed later.

2. The Line Between Title VII and Section 7

The second parameter concerns racist, sexist, or otherwise abusive language. Again, Title VII protects workers against workplace harassment, including harassment by coworkers and subordinates. Some scholars take issue with the Title

314. *See* Eastex, Inc. v. NLRB, 437 U.S. 556, 568 n.18 (1978).
315. *Id.*
316. *Id.*

VII framework, arguing that it merely strengthens employers' control over the workplace while undermining worker solidarity.[317] They consider it hostile to workplace realities and ignorant of class conflict.[318] Ahmed White goes so far as to accuse Title VII of "entrench[ing] employers—the very institutions and people whose practices were most responsible for workplace inequality in the first place—as the main line of protection for workers against discrimination."[319] That entrenchment seemingly contradicts the spirit of the NLRA, which entrenches *workers* as the main line of protection for workers through their collective identity and democratic processes.[320] But what happens when it is the very workers that the NLRA seeks to protect who are engaged in abusive behavior that undermines the workplace environment guaranteed under Title VII?

The means and ends test advanced above helps resolve this tension. Employers ostensibly meet their burden of proving that the means of workers' protest lost the protection of the Act by showing that disciplined workers screamed racist or sexist insults at the workplace. Those insults do not affect workplace conditions, democracy, or worker voice. On the contrary, they divide workers, weakening the workplace through atomization.

3. The Promise and Peril of Collective Bargaining

Collective bargaining has a critical role to play in workplace protest. Indeed, as mentioned, a key benefit of worker solidarity is that it places workers in a stronger negotiating position. Through bargaining, the employer and united workers may negotiate various workplace procedures, which could define disciplinary action in the event of specific, bargained-over misconduct and which would presumably stipulate dispute resolution modalities such as arbitration or mediation. Discipline administered accordingly would likely satisfy NLRA doctrine because the employer would have followed agreed-upon procedures subject to contractual dispute resolution.

For example, and with a nod to the Title VII tensions discussed above, collective bargaining agreements could set out a progressive discipline system for abusive workplace misconduct. Rather than fire a worker at first offense, workers could receive progressively severe punishment—ranging from a verbal to written warning to unpaid leave—before reaching the point of discharge. Workers would enjoy legal protections from discharge and abuse when their workplace challenges become emotional, and employers would have the necessary space to protect the

317. *See* Ahmed A. White, *My Coworker, My Enemy: Solidarity Workplace Control, and the Class Politics of Title VII*, 63 BUFF. L. REV. 1061, 1063 (2015) (arguing that Title VII "enhances employers' authoritarian control of the workplace while eroding the most crucial foundation of workers' rights: solidarity").

318. *Id.* at 1068 (arguing that Title VII is hostile to "the realities of class conflict in the workplace, and in indifference (if not hostility) to the collective interests of workers").

319. *Id.* at 1111.

320. *See, e.g.*, NLRB v. Circle Bindery, Inc., 536 F.2d 447, 453 (1st Cir. 1976) ("We recognize that even activity otherwise protected under section 7 ceases to be protected if conducted in an excessive or indefensible manner.").

workplace from mistreatment without fear of retaliatory litigation.

Naturally, cases such as *Lutheran Heritage* remind us that employers still abuse bargained-over, progressive disciplinary rules to rid the shop of union supporters. Nevertheless, those procedures, and the bargaining that precedes them, allow workers to participate in shaping the rules to which they are bound. Workers and employers, alike, consequently enjoy a more "peaceful" system of industrial labor relations capable of empowering strife through predictable means that the NLRA sought to instill.

C. Legislative Reform

This Article does not place much purchase in legislative reform, not because it is a bad idea but because Senate Republicans will likely continue to block any legislative advancement.[321] Calls for legislative reform have proven a "Sisyphean task,"[322] evinced by the near-century of failed efforts.[323] Consider the optimism surrounding labor renovation during the 2008 election of Obama; nevertheless, labor still failed to pass the Employee Free Choice Act (EFCA) despite its narrow revisionist scope.[324] Meanwhile, the NLRA's "articulation of legal rights" and its enforcement rotely proceed despite interfering with the very solidarity and peace its drafters designed it to protect.[325]

At the time of writing, the PRO Act languishes before the Senate,[326] notwithstanding the Biden administration's unwavering support. Nevertheless, the topic warrants attention for two reasons. First, recent efforts to revive momentum around the PRO Act could concretize protections for nonunion workers. [327] Second, given the current Supreme Court's hostility to agency actions, Congress should seize the opportunity to make its intentions around protecting workplace protest through NLRB decisions patently clear. Given the complexities around the second point, this Section briefly explains the doctrinal tensions before describing specific areas where Congress

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321. *See, e.g.*, Levin & Puckett, *supra* note 7, at 14 (advocating for the PRO Act while conceding "no amount of substantive proof or intellectual argument will convince many members of the business community and their lobbyists to reverse course and support the PRO Act").

322. *See* Morris, *supra* note 121, at 12–13 (arguing that "the likelihood of Congress enacting any [of the proposed reforms] without restrictive conditions . . . is nil"); Liebman, *supra* note 121, at 297; Kahlenberg & Marvit, *supra* note 124, at 221 ("[T]hough it is an uphill battle to pass any pro-worker legislation, it is even more unlikely that any significant labor law reform could pass Congress.").

323. For a succinct description of those failed reforms, see Levin & Puckett, *supra* note 7, at 11–13; Christopher Adinolfi, *Can Private Sector Unionization Be Saved?: An Analysis of the Pro Act as a Model for Effective NLRA Reform Notes*, 90 FORDHAM L. REV. 103, 118–23 (2021).

324. Kahlenberg & Marvit, *supra* note 124, at 222.

325. *See* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2747 (2014).

326. *See* Lisbeth A. Lyons, *PRO Act Gains Momentum in Closely Divided Senate*, PRINTINGIMPRESSIONS (Apr. 19, 2021) https://www.piworld.com/post/pro-act-gains-momentum-in-closely-divided-senate-printing-united-alliance-issues-call-to-action-to-oppose-legislation/ [https://perma.cc/59N4-WGGS] (discussing history of the PRO Act). For a discussion of how the labor movement might spur legislators into action, see Andrias & Sachs, *supra* note 27, at 833–36.

327. *See* Bustamante, *supra* note 7, at 11.

must improve the PRO Act to strengthen protections afforded to nonunion workers.

Under current Supreme Court cases, agency decisions are increasingly vulnerable to judicial review to determine whether they constitute "major questions" of economic and political significance.[328] Under its "major-questions doctrine," courts now demand evidence of a clear congressional authorization when an agency claims the mandate to regulate "significant political and economic activity." In a recent decision, the NLRB swatted away the employer's attempt to invoke the doctrine,[329] but the federal courts have yet to take up the issue.

Fred Jacob, a Solicitor of the NLRB, notes that the "Act is particularly susceptible to frustration by an expansive major questions doctrine."[330] That possibility reflects how factors such as unscheduled strikes,[331] workplace resentment, and quiet quitting[332] result in inefficiency and reduced profits for management, which could offer judges compelling reasons to decide that the Board's decisions implicate matters of political and economic importance. Considering that risk, Congress must adopt the PRO Act to clearly articulate that the NLRB has the authority to protect workplace strife as an extension of its authority to protect peace.

Returning to the legislation more broadly, the PRO Act already has promising features that will assist nonunion workers and organizers. The Act helpfully prohibits captive audience meetings,[333] which would be crucial in emboldening workers to challenge managerial dominance.[334] It also tries to make union elections easier by offering alternatives to in-person ballot elections.[335] The Act creates a rebuttable presumption that an employer's unlawful conduct under the NLRA affected the election outcome.[336] The NLRB must prioritize and immediately seek reinstatement for unlawfully fired workers, assuming a preliminary investigation

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328. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697 (2022); Biden v. Nebraska, 143 S. Ct. 2355 (2023).

329. Cemex Constr. Materials Pac., LLC, 372 N.L.R.B. No. 130, slip. op. at 2 (2023).

330. *See* Fred Jacob, *The National Labor Relations Act, the Major Questions Doctrine, and Labor Peace in the Modern Workplace*, 65 BOST. COLL. L. REV. 4 (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4535075 [https://perma.cc/9TSJ-NMSC].

331. *See, e.g.*, Jaffe, *supra* note 1 ("Shortly after Rizzo's firing, her former [Starbucks] co-workers voted unanimously to launch a two-day strike.").

332. *See* Harter, *supra* note 311 (reporting the millions of workers who consider themselves quiet quitters). Notably, some researchers claim that quiet quitting is a longstanding phenomenon. One empirical study argues that quiet quitting "is a new name for an old behavior" that reflects whether management is focused on building a relationship with the employees. *See* Jack Zenger & Joseph Folkman, *Quiet Quitting is About Bad Bosses, Not Bad Employees*, HARV. BUS. REV. (Aug. 31, 2022), https://hbr.org/2022/08/quiet-quitting-is-about-bad-bosses-not-bad-employees [https://perma.cc/W49Q-FV27].

333. *See* Protecting the Right to Organize Act of 2023, H.R. 20, S. 567, 118th Cong. § 104(3) (2023) ("[I]t shall be an unfair labor practice . . . for any employer to require or coerce an employee to attend or participate in such employer's campaign activities unrelated to the employee's job duties . . . .").

334. *See* Sachs, *supra* note 27, at 366, 369–72.

335. *See* H.R. 20, S. 567 § 105(1) (amending section 9 of the NLRA by offering alternatives such as by mail, electronically, at work and at a neutral site).

336. *Id.* § 105(1)(B).

reveals that the employer violated the law.[337] Finally, it revives workers' arsenal by prohibiting employers from permanently replacing strikers[338] and ends the ban on secondary picketing, strikes, and boycotts.[339] The PRO Act thus holds compelling promise to improve many of labor law's current ailments, including those that obstruct unions' access to nonunion workers.

On the other hand, the Act falls short of protecting worker organizers. Current efforts to get the Act across the finish line are about to miss a critical opportunity to address declining solidarity in the American workforce. Below are three proposals for additional text to help strengthen organizing protections accordingly.

First, Congress must amend the PRO Act to identify the co-constitutive roles of strife and peace in the Act's declaration of policy.[340] Doing so in the preamble will assist later interpretations in caselaw and will protect the NLRB from judicial scrutiny under the major-questions doctrine, discussed above.

Second, Congress must clearly articulate legal protections for employees engaged in generative strife, either in Section 7 or Section 13, so that such protections are not limited to strike action but would encompass forms of challenges currently prohibited, such as sit-down and sympathy protest. Of course, it would be impossible and impractical for Congress to enumerate all forms of permissible strife through legislation. Congress must nevertheless make clear that the Act considers workplace challenges antecedent to labor peace.

At this point, an obvious interjection is that, given its problematic misconstruction, labor peace should be removed from labor legislation altogether. After all, it is the very peaceful enterprise, contractual framework, and business unionism that scholars like Karl Klare allege pigeonhole workers into an asymmetrical power arrangement in which the winners and losers have long been decided.[341] Perhaps it is time for workers to enjoy stronger protections to oppose management, band together, and cause good trouble in the name of better working conditions. In that case, impositions of peace objectives may unnecessarily interfere with that momentum.

As romantic as such an ideal may be, pragmatism may urge a greater balance between corporate and labor interests, at least in the short-term PRO Act context. The drafters must demonstrate that the Act can reach a consensus. Senator Wagner's strategy

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337. *Id.* at § 108(2).

338. *Id.* at § 104(1).

339. *Id.* at § 104(2) (amending 29 U.S.C. § 158(b)(4) and (7) to remove prohibitions of secondary activities).

340. As currently written, the NLRA's declaration of purpose merely indicates that the "denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce." 29 U.S.C. § 151. The text should instead affirm that "the denial by some employers of the right of employees to organize, including their right to engage in short-term and protected strife, and the refusal by some employers to accept the procedure of collective bargaining lead to unpredictable and repetitive strikes and other forms of industrial strife."

341. *See, e.g.*, Klare, *supra* note 108, at 267 ("New Deal reform appears to have fostered the co-optation of the workers' movement . . . .").

suggests that Congress may be more comfortable limiting statutory references to peace to long-term labor relations than eliminating the objective altogether.

Yet, hope is not lost. Wagner's vision of labor law assumed a framework in which strife and worker power beget peace. By consolidating, workers have a more significant role in determining what a peaceful framework in their contracts entails.[342] As mentioned earlier, an employer might insist on a civility rule during negotiations. Still, workers might bargain by requiring that discipline for violating such rules is a progressive process coupled with various avenues for worker representation and appeal. Workers might also negotiate regular consultations with management over day-to-day workplace issues and a greater share of corporate profits. While those gains are certainly not guaranteed, workers are far more likely to win them through collective negotiations than as atomized employees.

Third, Congress must express clearly that the Act extends to hundreds of millions of nonunion workers in the United States.[343] It should do so anticipating that those workers will be unfamiliar with labor law cases or the extent of their protections.[344] Under its nonunion worker agenda, Congress could also delegate additional responsibilities to NLRB regional offices to provide nonunion workplace training.

Some may worry that the PRO Act as proposed will fail to pass constitutional muster.[345] Should the Supreme Court wish to delegitimize Congress' delegation of labor authority to the NLRB as undue interference with commerce, the PRO Act will give it ample opportunity to do so. On the other hand, the above proposals might also strengthen the constitutional valor of the PRO Act. Labor strife is not going away. Consequential labor shortages owing to worker discontent increasingly affect supply chains; protests thus far have crossed state boundaries through various Starbucks, Amazon, universities, and delivery companies. Although it is impossible to predict, given the Roberts Court's distaste for federal agencies and authority, there is too much at stake—workplace mobility, fundamental labor rights, collective bargaining, dispute resolution—to seek discrete solutions.

This Article began by recounting the significant costs incurred by workers fighting for better workplace conditions. Following their firings, media attention around Lexi Rizzo and Chris Smalls, which was revived following photos with

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342. This piece benefits from prior movement literature arguing that the process of bargaining and institutionalization go hand-in-hand with grassroots power. *See* TAIT, *supra* note 147, at 19 (arguing that "mobilization and institutionalization can coexist" so long as the apparatus is "[f]lexible, democratically controlled, [and] nonbureaucratic").

343. *See* BUREAU LAB. STATS., U.S. DEP'T OF LAB., UNION MEMBERS – 2023, *supra* note 15.

344. *See* John F. Fullerton III & Bruce R. Millman, *NLRA Issues for the Non-Union Workplace*, 24 LAB. LAW. 31, 41–56 (2008) (showing how employers frequently implement workplace rules governing confidentiality policies, non-solicitation, non-fraternization, email usage, arbitration, and employee participation committees that violate the NLRA).

345. *See generally* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 523–24, 551 (1935) (invalidating the National Industrial Recovery Act, the NLRA's precursor, under the nondelegation doctrine and impermissible use of congressional power under the Commerce Clause).

President Biden at the White House,[346] soon waned. Their stories have run cold. While public attention is short-lived, the struggles confronting discharged workers like Rizzo and Smalls to manifest steady income and job security proceed invisibly. Congress must act boldly to protect would-be organizers facing retaliatory dismissal so that vulnerable workers no longer have to.

CONCLUSION

Labor doctrine has forgotten the co-constitutive roles of strife and peace. It leaves workers at nonunion facilities such as Starbucks and Amazon without protection when they try to challenge management and garner solidarity. Their vulnerable workplace rights resemble those that preceded the New Deal bargain, when rank-and-file workers had to resort to unlawful conduct in their quest for greater workplace voice and power. The NLRA was supposed to resolve the tension between labor strife and peace through a vision of short-term antagonism as the means to achieving long-term stability.

Federal judges and the NLRB overlook the New Deal's compromise and, by doing so, fail America's nonunion workers seeking to combine their voices in workplace protest. Without sufficient legal protections to engage in disruptive processes, those workers remain atomized, powerless, and at the mercy of employer discipline. By misconstruing peace as an omnipresent objective, labor doctrine stifles solidarity and the eventual peace that solidarity uniquely advances.

The consequences of that misconstruction are severe and deserve widespread attention. Workers capable of acting in solidarity improve not only their working conditions but also production, consumption, wage equality, and democratic participation. The societal and economic benefits of solidarity and collective bargaining are critically important to the working class and beyond.

Unlike those who call to reimagine a new labor law, a minority of voices aptly contend that the NLRA has the "raw materials" to protect workplace mobilization and solidarity.[347] To realize that potential, the NLRB and federal judges must acknowledge the extensive mobilization processes embedded in organizing and bargaining. Labor law must take a holistic approach across cases to ensure a greater tolerance for workplace strife. Any legislative amendments, such as the PRO Act, must reconcile the fictional strife/peace paradox by expressly protecting nascent organizing efforts. The law will only protect industrial peace if it can protect America's vulnerable nonunion workers searching for solidarity through strife.

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346. *See* Mark Gruenberg, *Young Organizers Talk Unions with Biden and Bernie at the White House*, PEOPLE'S WORLD (Jul. 21, 2023), https://www.peoplesworld.org/article/young-organizers-talk-unions-with-biden-and-bernie-at-the-white-house/ [https://perma.cc/HHV8-NYTM] (describing meeting with Lexi Rizzo and others at the White House); Alex Woodward, *'He said I got him in trouble': Biden Meets Amazon Union Leader at White House Meeting on 'Extraordinary' Organising Efforts*, INDEPENDENT (May 05, 2022), https://www.the-independent.com/news/world/americas/us-politics/biden-amazon-union-christian-smalls-b2072602.html [https://perma.cc/GB8L-5RQ3] (describing Chris Smalls meeting with President Biden in 2022).

347. *See* Sachs, *supra* note 124, at 399.